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90-1134

Supreme Court, U.S.
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No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF MISSOURI,
Petitioner,

vs.

DAVID URBAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

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QUESTIONS PRESENTED

I.

WHETHER *GRADY V. CORBIN* REQUIRES THAT ALL POTENTIAL CHARGES ARISING OUT OF THE SAME INCIDENT BE TRIED IN A SINGLE PROCEEDING, EVEN IN CASES WHERE THE STATE WILL RELY ON DIFFERENT CONDUCT TO PROVE THE DIFFERENT CHARGES.

II.

WHETHER THIS COURT MISCONSTRUED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN *GRADY V. CORBIN*?

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OPINIONS BELOW

The Missouri Supreme Court en banc opinion ordering the respondent discharged is reported at 796 S.W.2d 599 (Mo. banc 1990). The en banc opinion of the Missouri Court of Appeals, Western District, is not reported but is included in the Appendix (A-20-80).

JURISDICTIONAL STATEMENT

The Missouri Supreme Court issued its en banc Opinion on September 11, 1990. Petitioner's motion for a rehearing was denied on October 16, 1990. Pursuant to Supreme Court Rule 13.4, the present

petition for a writ of certiorari was required to be filed within ninety days of the denial of petitioner's motion for a rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution:

   [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

2. The Fourteenth Amendment to the United States Constitution:

   Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 568.060.1(2) RSMo 1986 provides:

   A person commits the crime of abuse of a child if he

   (2) Photographs or films a child less than seventeen years old engaging in a prohibited sexual act or in the simulation of such an act or who causes or knowingly permits a child to engage in a prohibited sexual act or in the simulation of such an act for the purpose of photographing or filming the act.

4. Section 568.060.2, RSMo 1986 provides:

   As used in this section "prohibited sexual act" means any of the following whether performed or engaged in either with any other person or alone: . . . any other activity or

nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.

5. Section 566.010, RSMo 1986 provides:

Sexual contact means any touching of the genitals or anus of any person, or the breast of any female person, or any such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person.

6. Section 573.010(1), RSMo 1986 provides:

Child pornography means any material or performance depicting sexual conduct, sexual contact, or a sexual performance as these terms are defined in section 556.061, RSMo, and which has as one of its participants or portrayed actual observers a child under the age of eighteen; provided, that it shall not include material which is not the visual reproduction of a live event.

7. Section 573.025.1, RSMo 1986 provides:

A person commits the crime of promoting child pornography in the first degree if, knowing its content and . . . he photographs, films, videotapes, produces, publishes or otherwise creates child pornography, or knowingly causes another to do so.

STATEMENT OF THE CASE

Respondent, David Urban, was originally charged with one count of felony abuse of a child, Section 568.060, RSMo 1986 and one count of promoting child pornography in the first degree, § 573.025, RSMo 1986. On April 30, 1987 respondent's trial began pursuant to a second amended information (A-81-82). After the close of all the evidence and arguments of counsel, the case was submitted to the jury. The jury found respondent guilty of abuse of a child and assessed one years' imprisonment plus the maximum fine. The jury found respondent not guilty of the charge of promoting child pornography.

Respondent then filed a motion for a new trial and the court sustained the motion. The court stated that it "did not believe that the use of the information charged the way it did in the instructions is a valid way of submitting the case." The state was then given five days to file an amended information.

Defense counsel submitted a motion to dismiss the State's amended information on double jeopardy grounds. The prosecutor noted that the defendant had asked for a new trial and was granted one by the court. The court also granted the State leave to file an amended information which it did. Thus, the prosecutor argued, there was no previous conviction because the jury's decision was set aside. Therefore, there was no double jeopardy question.

Defense counsel conceded that in Missouri you can be charged with various offenses for the same conduct if that conduct violates several statutes. Defense counsel argued, however, that the State cannot split an offense and keep trying a defendant over and over. The court overruled the motion.

The second trial began on April 14, 1988 at which time respondent waived his right to a jury trial. The State submitted to the court a stipulation of the parties that included a partial transcript of respondent's first trial. This evidence showed that on April 19, 1986, between the hours of 8:00 and 9:00 a.m., Tami Gessling took her fifteen month old son Andrew to the home of his grandparents, Patsy Urban and appellant David Urban. The grandparents were to watch Andrew while Tami and her husband pained their home.

Respondent took nude photographs of Andrew and Patsy Urban which included pictures of Andrew touching Patsy's breast; of Andrew eating a marshmallow off her breast and of Patsy lifting a breast toward the child's mouth; Patsy with her legs spread apart, a ball between her legs and Andrew touching Patsy in the pubic area; and pictures of Patsy leaning over Andrew with her breasts exposed. When Andrew was picked up later that evening, the Urbans did not tell Mrs. Gessling that they had taken any photographs of Andrew.

On or about April 30, 1986, David Surratt, the regional vice-president of Color Craft Corp., a photo finishing company, was notified about two rolls of film that had come to Color Craft from a K-Mart Store in Columbia, Missouri. The pictures showed Patsy Urban and Andrew, both nude, playing together. Mr. Surratt then contacted the Boone County Sheriff's Department about the film and later sent them the film.

After the film arrived at the Sheriff's office in Boone County, it was taken over to the Columbia Police Department. Susan Stoltz of the Columbia Police Department was assigned to the case. She made copies of the photographs, retained the negatives and sent the photos to K-Mart. The K-Mart employees were instructed to notify the police when the film was picked up.

Richard Germano was working at K-Mart on May 2, 1986. He was directed by his supervisor to follow a woman later identified as Mrs. urban, out of the store. Mrs. Urban had just picked up the photos. She sat in a van and was later joined by respondent. They drove around the parking lot and then went back into K-Mart. Richard gave his boss the license plate number of the van and the police were called.

Irene Isom was working in the Camera Department in K-Mart on May 2, 1986. She saw Patsy and David Urban in the store and they approached Ms. Isom. They asked if there was anything they could do because the negatives to their film were missing. She told them she would call Color Craft on Monday.

Officer Douglass Swandt of the Columbia Police Department heard a dispatch over his radio to be on the lockout for the Urban's vehicle. He saw the vehicle and stopped it. He approached the van and recognized Patsy Urban from photographs he had seen earlier. He asked if he could see the photographs she just picked up and Mrs. Urban handed them to him. Mrs. Urban was then taken to the Columbia Police Department.

Detective Stoltz also went to the police department and contacted Officer Swandt. Officer Swandt gave Detective Stoltz the photos he had seized. Detective Randall McMillen, who was also working on the

case, went to the station and talked with Detective Stoltz. He then took David Urban to an interview room and read him his rights.

Mrs. Gessling was called down to the station and shown the photographs. She threw them down in disgust. Patsy Urban told the police that her husband David took the pictures.

The state proceeded to offer several of the photographs into evidence. Defense counsel objected to admission of some of the photographs on relevancy grounds, but the objection was overruled. The court stated if any of the photographs were irrelevant, the Court could disregard them safely. Respondent also introduced a statement by Mrs. Urban which stated that this was the only time Mr. Urban had taken photographs of Mrs. Urban and her grandson without any clothes on.

At the close of the state's evidence, respondent filed a motion for a judgment of acquittal which was overruled. Closing arguments were heard and respondent was then found guilty of abuse of a child, § 568.060, RSMo 1986, by the trial judge. The court sentenced respondent to a term of three years imprisonment.

A timely appeal was filed in the Missouri Court of Appeals, Western District. Respondent raised ten claims of error including a double jeopardy claim. Respondent did not raise a sufficiency of the evidence claim. On August 1, 1989, the court, on its own motion, transferred the case to the court en banc on the issue of sufficiency of the evidence. On November 14, 1989, in a six to five decision, the Missouri Court of Appeals, Western District, reversed respondent's conviction due to insufficiency of the evidence (A-20-80). The case was transferred to the Missouri Supreme Court by certification of a dissenting judge pursuant to Missouri Constitution Article V, § 10, and Missouri Supreme Court Rule 83.01 (A-19, 50).

The case was then argued in the Missouri Supreme Court. On September 11, 1990, the Missouri Supreme Court took the case as an initial appeal and reversed respondent's conviction on double jeopardy grounds (A-2-18). The court relied on *Grady v. Corbin*, 495 U.S. ___, 100 S.Ct. 2084, 109 L.Ed.2d 548 (1990), and its interpretation of the Fifth Amendment of the United States Constitution (A-6-10). The

court found that the charge in the second trial involved identical conduct for which respondent was acquitted in the first trial; namely the taking of pictures (A-6).

Petitioner filed a motion for a rehearing on September 24, 1990. That motion was overruled on October 16, 1990 (A-1). This petition for a writ of certiorari ensues.

ARGUMENT

I.

WHETHER *GRADY V. CORBIN* REQUIRES THAT ALL POTENTIAL CHARGES ARISING OUT OF THE SAME INCIDENT BE TRIED IN A SINGLE PROCEEDING, EVEN IN CASES WHERE THE STATE WILL RELY ON DIFFERENT CONDUCT TO PROVE THE DIFFERENT CHARGES.

In *State v. Urban*, 796 S.W.2d 599 (Mo. banc 1990), the Missouri Supreme Court reversed respondent's conviction by misconstruing *Grady v. Corbin*, 495 U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). When all the excess verbiage is stripped away, the Missouri Supreme Court's opinion in *Urban* states that respondent was originally charged in Count I with abuse of a child, § 568.060, RSMo 1986, in that he photographed the child victim

> engaged in the simulation of a sexual act . . . touching Patsy Urban's vaginal area.

(A-3).

Respondent was charged in Count II with promoting child pornography, § 573.025, RSMo 1986, in that he knowingly

> photographed child pornography consisting of . . . touching the breasts of Patsy Urban.

(A-3, 4).

After a jury trial, respondent was convicted of Count I and acquitted on Count II. The trial court sustained respondent's motion for a new trial on Count I due to problems with the information and the jury instructions. The State was given five days to file another information; this was done and the new information charged respondent with abuse of a child, § 568.060, RSMo 1986, in that he

> knowingly photographed a child less than seventeen years old, engaging in nudity depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.

Respondent waived a jury trial and the parties submitted a stipulation as to the evidence which included a partial transcript of respondent's first trial and the exhibits that were introduced at the first trial. Respondent was again found guilty of abuse of a child and sentenced to three years imprisonment.[1]

The Missouri Supreme Court reversed respondent's conviction in a five to two decision. The Court found that the same conduct, the taking of photographs, was the basis of the charges in the two trials. The Court concluded that Count II in the first trial and the charge in the second trial "depend on identical conduct" and thus respondent's conviction was barred by the Double Jeopardy Clause of the United States Constitution.[2] The basis for this conclusion was the *Grady* case.

The Missouri Supreme Court's opinion misinterprets *Grady*. In *Grady* the defendant was in an auto accident and charged with driving while intoxicated and failing to keep to the right of the median. Defendant pled guilty to both charges. Thereafter, the state charged the defendant with assault and reckless manslaughter. The conduct the state intended to rely on in proving these subsequent charges were defendant's driving while intoxicated, failing to keep to the right of the median, and driving too fast.

This Court found that the state admitted that it would use "the entirety of the conduct for which Corbin was convicted — driving while intoxicated and failing to keep right of the median — to establish essential elements of the homicide and assault offenses." *Id.* at 2094. This court then ruled that Corbin's double jeopardy rights were violated.

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[1] Petitioner notes that respondent's co-defendant, Patsy Urban, was charged with and convicted of sexual abuse in the first degree, § 566.100, RSMo 1986, and promoting child pornography in the first degree, § 573.025, RSMo 1986. Her convictions were affirmed by the Missouri Court of Appeals, Western District. *State v. Urban*, 798 S.W.2d 507 (Mo.App., W.D. 1990).

[2] The Fifth Amendment is "enforceable against the States through the Fourteenth Amendment." *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 2062, 23 L.Ed.2d 707 (1969).

The court set out the following test to determine whether a subsequent prosecution violates the double jeopardy clause. First, the subsequent prosecution must survive *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 228 (1932). Under *Blockburger*, a successive prosecution for the same criminal act or transaction under two criminal statutes is prohibited whenever each statute does not "requir[e] proof of a fact which the other does not." *Blockburger, supra*, 284 U.S. at 304.

If the successive prosecution is not barred by *Blockburger*, the prosecution may still be barred if the government

> "to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted."

Grady, supra, 109 S.Ct. at 2093. The emphasis is on what conduct the state will prove, not the evidence the state will use to prove that conduct. *Id.* at 2093.

The subsequent prosecution in the case at bar clearly passes the *Blockburger* test. Respondent was acquitted on an information that focused on the child victim touching the breasts of Patsy in violation of § 573.025, promoting child pornography. The subsequent conviction of respondent was for knowingly photographing the child victim engaging in nudity depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction in violation of 568.060, abuse of a child. Clearly, the two charges do not involve the same facts and statutory elements. Each requires proof of facts and elements, the child victim's touching of Patsy's breasts in Count II of Trial I, but no nudity required, versus, the child victim engaging in nudity for the purpose of sexual stimulation or gratification of any individual who may view such depiction, with no touching of the breast required, in Trial II. The two offenses are not the same offense under the double jeopardy clause. *Blockburger, supra*. Thus, respondent's subsequent conviction is not barred under *Blockburger*.

Additionally, the state submits that respondent's second prosecution was not barred under *Grady, supra*. Despite the assertions to the

contrary in the Missouri Supreme Court opinion, the state did not establish any essential element of the offense in the second trial, which involved "knowingly photographing the child victim engaging in nudity," § 568.060, RSMo 1986, by proving conduct that constituted an offense of which respondent was acquitted of in his first trial, i.e., knowingly photographing child pornography consisting of the child victim touching the breasts of Patsy Urban. Section 573.025, RSMo 1986. In the first trial, the state attempted to prove Urban's conduct of photographing the child touching Patsy's breast; in the second trial the essential elements proved by the state was Urban's photographing the child-victim engaging in nudity for the purpose of sexual gratification or stimulation of anyone who viewed the pictures. Under any mode of analysis, the conduct in the two trials was not "identical" — being exactly equal and alike. The American Heritage Dictionary 639 (2d.Ed. 1985).

The Missouri Supreme Court mistakenly relied on *Grady*, *supra*, and flatly stated that the state was relying on the same conduct, the taking of pictures, in both prosecutions. In *Grady*, however, this Court did not find a double jeopardy bar on the basis that the state was going to rely on the identical general conduct of Corbin's driving a car in the subsequent prosecution. It was the specific actions that Corbin took while driving the car and that he had pled guilty to, driving while intoxicated and failing to keep to the right of the median, that ran afoul of the Fifth Amendment. Otherwise, the state in *Grady* would be barred from pursuing any subsequent prosecution that rested on proving the conduct of Corbin's driving his car, even his conduct of driving too fast. Such an analysis was rejected in the *Grady* opinion which expressly states that the state could pursue a subsequent prosecution if it relied solely on Corbin's driving too fast. *Id.* at 2094.

Thus, in the case at bar, the fact that respondent was charged with taking pictures in both prosecutions does not mandate a ruling that the state relied on the same conduct in both cases. Respondent was prosecuted in both trials for the various acts he photographed, not the mere fact that he took photographs.

The Missouri Supreme Court also stated that the charge in the second trial could have been included in the charges brought in respondent's first trial, citing *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). The court then stated, however, that once the first trial concluded, no additional charges could be brought that would rely on the same conduct. The court wrote:

> "It makes no difference whether the first trial resulted in a conviction, as in *Grady*, or, as here, in an acquittal. Under *Grady*, the state may not prosecute the defendant seriatim for the same conduct by employing different statutory alternatives."

Urban, supra.

As discussed previously, the charges did not involve the same conduct. Moreover, the court's claim of "no difference", for which it cites no authority, and which is most certainly not present in the *Grady* opinion, is untenable. When there is a plea of guilty as in *Grady*, or a previous conviction, it is indisputable that the conduct proved by the state is that conduct that constitutes the essential elements of the offense. After an acquittal, there generally is no way of knowing which element(s) the state failed to prove. *Dowling v. United States*, 493 U.S. ___, 110 S.Ct. 668, 674, 107 L.Ed.2d 708 (1990). Thus, the outcome of the previous litigation does make a difference, as that outcome determines what conduct was actually proved at the first trial and would serve as a bar to a subsequent prosecution.

Furthermore, the court referred to respondent's "taking pictures" as being the conduct that was the same in both prosecutions. It was not disputed at either trial that respondent took the pictures. The issue at trial concerned respondent's intent in taking the pictures. Clearly, whatever reason the jury had for acquitting respondent of Count I in the first trial, it was not because respondent did not take the pictures. Thus, the acquittal in the first trial is not a per se bar of a subsequent trial, as the State was not attempting to relitigate the facts underlying a prior acquittal. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

The only rational explanation for the court's opinion, which relies exclusively on the Fifth Amendment of the United States Constitution, is that the Missouri Supreme Court has interpreted *Grady* to have adopted a single transaction view of the double jeopardy clause. Such an approach would require that all charges against a defendant growing out of a single transaction be tried in one proceeding. *See Jones v. Thomas*, 491 U.S. ___, 109 S.Ct. 2522, 2527, 105 L.Ed.2d 322 (1989). Such a view has been steadfastly rejected by this Court, *Garret v. United States*, 471 U.S. 773, 790, 105 S.Ct. 2407, 2417, 85 L.Ed.2d 764 (1985), and rejected in *Grady, supra*, at 2094, n.15.

Finally, the ill sought to be avoided by *Grady* was to protect a defendant from the burden of multiple trials. *Id.* at 2093. The Court in *Grady* stated that otherwise the state could improve its presentation of proof in each trial by prosecuting Corbin in four separate trials. *Id.* In *Urban*, however, the state convicted appellant in his first trial on Count I and the state relied on a stipulated record to get a second conviction in the second trial. Respondent suffered no additional burden, in fact he got a second bite at the apple. Nor did the state hone or improve its case as it relied on the same evidence in both trials. Thus, the supposed ill that *Grady* was meant to correct is not present in this case.

Petitioner submits that the Missouri Supreme Court has misinterpreted and misapplied the *Grady* decision. Accordingly, petitioner respectfully requests that this Court grant certiorari.

II.

WHETHER THIS COURT MISCONSTRUED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN *GRADY V. CORBIN*.

This court's decision in *Grady v. Corbin*, 495 U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) signifies a radical departure for this court in interpreting the double jeopardy clause of the Fifth Amendment. Appellant submits that the *Grady* decision is unsupported by precedent and unworkable in practice and therefore should be overruled.

The Double Jeopardy Clause of the Fifth Amendment states:

> "[N]or shall any person be subject for the same offense to be put twice in jeopardy of life or limb."

The basic test for determining whether a successive prosecution, involving conduct that violates two distinct statutory provisions, contravenes double jeopardy principles as set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). Thus, if each statute requires proof of a fact that the other does not, there is no double jeopardy violation. *Iannelli v. United States*, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284, 1293-94, n.17, 43 L.Ed.2d 616 (1975).

In *Grady*, however, this court determined that a subsequent prosecution must not only survive the *Blockburger* test. *Grady, supra*, at 2093. The court ruled that the double jeopardy clause also bars "any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* The emphasis, however, is not on the evidence used to prove that conduct, but, rather is on what conduct the state will prove. *Id.*

Petitioner submits that this approach is unworkable. One of the principal problems with this analysis is how to reconcile *Grady, supra*, with *Dowling v. United States*, 493 U.S. ___, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). Under *Dowling, supra*, the government, in a subsequent prosecution, may introduce evidence of a previous crime, — "prove conduct" — to establish a defendant's commission of a later, similar crime, — "to establish an essential element" — even if the defendant was acquitted in the previous prosecution. Whenever possible, the government introduces such evidence of a defendant's conduct from a previous prosecution to establish an essential element of an offense in a subsequent prosecution. But such proving of conduct to establish an essential element of an offense in a subsequent prosecution is now barred by *Grady*.

Thus, it appears that in those cases in which evidence of a defendant's conduct from a previous prosecution would be admissible pursuant to

Dowling in a subsequent prosecution would often be the same cases that *Grady* bars from being prosecuted. The state is left with little solace in knowing that although the subsequent prosecution is barred under *Grady*, if it had not been so barred the state could have admitted into evidence and established a defendant's guilt via proof of a defendant's conduct from a previous prosecution under *Dowling*. *Grady* has rendered *Dowling* a nullity in the majority of cases.

The *Grady* opinion also offers few clues as to how a subsequent trial court is to know what conduct was relied on by the government to garner a conviction in a previous prosecution. Does a defendant's double jeopardy rights in subsequent prosecution extend only as far as the details of his conduct are contained in the charging document in the previous prosecution? as far as the evidence produced by the state in the previous prosecution? as far as all the evidence adduced at the previous prosecution including the defendant's evidence? Whatever minimal attraction the *Grady* approach may have in theory, it is clearly unworkable in practice.

Furthermore, the court's statement that the critical inquiry is not on the evidence used to prove the conduct for which a defendant has already been prosecuted, but what conduct the state will prove, is a circular syllogism. One could similarly argue that under *Dowling*, *supra*, the critical inquiry is not on what conduct the state will prove via the evidence from the previous prosecution and that the state wishes to introduce at a subsequent prosecution. Rather, the key is what evidence from the previous prosecution that the state will use to prove that conduct in a subsequent prosectuion. The terms "conduct" and "evidence" do not exist in vacuums and the *Grady* opinion offers no guidance as how to separate the two.

Thus, in *Grady*, if the state were to proceed and properly prosecute the defendant for manslaughter by proving Corbin's driving too fast, the state could not rely on the conduct for which the defendant was previously convicted — driving while intoxicated and failing to keep to the right of the median. The State, however, could apparently introduce evidence that Corbin was intoxicated and crossed the median, under *Dowling*, to prove the existence of a statutory element —

that Corbin was operating a motor vehicle on a public highway — in a subsequent prosecution. It is clear that the two cases cannot be rationally reconciled.

Finally, although the court claims it has not adopted a single transaction view of the double jeopardy clause in *Grady*, the effect of *Grady* will be the same. Prosecutors will now be forced to bring all charges against a defendant, growing out of a single criminal transaction, and try the charges in one proceeding. Otherwise, the State runs a great risk of violating the murky waters of *Grady*. Thus, a view that the court has "steadfastly refused to adopt", *Garret v. United States*, 471 U.S. 777-790, 105 S.Ct. 2407, 2417, 85 L.Ed.2d 764 (1985), and that is found nowhere in the plain text of the Constitution, will have been adopted.

Petitioner submits that the *Grady* decision is irreconcilable with *Dowling* and unworkable in practice. Accordingly, petitioner respectfully requests that this Court grant certiorari.

CONCLUSION

Petitioner respectfully requests that the petition for writ of certiorari be granted and that the judgment of the Missouri Supreme Court be reversed.

Respectfully submitted,

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APPENDIX

BEST AVAILABLE COPY

APPENDIX A

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102

October 16, 1990

Mr. John P. Pollard
Assistant Attorney General
P. O. Box 899
Jefferson City, MO 65102

In re: State of Missouri vs. David Urban
Supreme Court No. 72282

Dear Mr. Pollard:

Please be advised that the Court this day entered the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Very truly yours,

THOMAS F. SIMON

/s/ Mary Elizabeth McHaney
Deputy Clerk, Court en Banc

cc: Mr. Donald L. Wolff
Mr. William D. Rotts

APPENDIX B

SUPREME COURT OF MISSOURI
en banc

No. 72282

STATE OF MISSOURI,
Respondent,

vs.

DAVID URBAN,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY

The Honorable Thomas Brown III, Judge

The defendant was convicted of child abuse by means of photographing, in violation of § 568.060, RSMo 1986, reading as follows:

1. A person commits the crime of abuse of a child if he:

* * *

(2) Photographs or films a child less than seventeen years old engaging in a prohibited sexual act or in the simulation of such an act or who causes or knowingly permits a child to engage in a prohibited sexual act or in the simulation of such an act for the purpose of photographing or filming the act.

2. As used in this section "prohibited sexual act" means any of the following, whether performed or engaged in either with any other person or alone: sexual or anal intercourse, masturbation, bestiality, sadism, masochism, fellatio, cunnilingus, any other sexual activity or nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.

* * *

He appeals, raising numerous points of error. The Missouri Court of Appeals, Western District, sitting en banc, reversed the conviction by a vote of 6 to 5. The case was transferred here by the certificate of a dissenting judge, asserting conflict with several cases. We take the entire case as on initial appeal and do not find it necessary to determine whether there is conflict. We conclude that the defendant's claim of double jeopardy is well taken and reverse on that issue alone. So concluding, we find only minimal discussion of the facts necessary.

The defendant is a professional photographer. The charges have to do with 33 color pictures, in two rolls, taken and developed at the same time, showing the defendant's wife and her grandson, aged 15 months, in various unclad poses. Although the defendant had the equipment for developing the pictures, the rolls were delivered to a commercial developing facility, which reported to the public authorities. The prints and negatives then came into possession of the police.

Trial commenced on a second amended information and was submitted on two counts against the defendant as follows (emphasis supplied):

> *COUNT I:* In violation of Section 568.060, RSMo, committed the Class C felony of abuse of a child, punishable upon conviction under Sections 558.011.1(3) and 560.011, RSMo, in that on or between the 1st day of April, 1986, and the 30th day of April, 1986, in the County of Boone, State of Missouri, the defendant, acting in concert with Patsy J. Urban, *photographed* . . . a child less than seventeen years old, engaged in the simulation of a sexual act, to wit: . . . touching Patsy J. Urban's vaginal area, and
>
> *COUNT II:* In violation of Section 573.025, RSMo, committed the class B felony of promoting child pornography in the first degree, punishable upon conviction under Section 558.011.1(2) and 573.025.2, RSMo, in that on or between the 1st day of April, 1986, and the 30th day of April, 1986, in the County of Boone, State of Missouri, defendant, acting in concert with Patsy J. Urban, knowing its content and character, *photographed* child

> pornography consisting of . . . touching the breasts of Patsy J. Urban, and all against the peace and dignity of the State.[1]

The jury found the defendant guilty under Count I, recommending a sentence of one year, and not guilty under Count II. The trial court granted a new trial on Count I. The trial judge did not file a formal opinion stating reasons for this latter ruling, but the substance of his conclusions can be gleaned from the colloquy reported in the transcript as follows (emphasis supplied):

> MR. WOLFF [counsel for the defendants].
>
> It seems to me that for the Court to grant the Motion for New Trial and to deny the Motion for Judgment of Acquittal would be irreconcilable. The issues in the case which make the count for which she (sic.) was convicted because it didn't state a crime would call for an acquittal more so than it would call for a Motion for New Trial. If the court agreed with the reasoning as to why the new trial should have been given, then that would have been the basis for a judgment of acquittal as opposed to a Motion for New Trial.
>
> THE COURT
>
> . . . I know what you're saying about judgment of acquittal. I hear what you're saying, but that's not the basis for the Court ruling what it did. . . .
>
> On Count I in the David Urban case and Counts I and II in the Patsy Urban case, I think it's possible for the prosecutor to charge correctly. Whether the prosecutor can charge correctly is another matter. . . .

---

[1] The statute reads in pertinent part as follows:

1. A person commits the crime of promoting child pornography in the first degree if, knowing its content and character, he photographs, films, videotapes, produces, publishes or otherwise creates child pornography, or knowingly causes another to do so.

* * *

Which doesn't mean that the prosecutor may not be able to state all the elements of the offense, I don't know. They should have that opportunity if they—I would put it this way, *if there is not an Amended Information filed, a Motion to Dismiss would be well taken at that point.*

* * *

... My whole point in this case, Mr. Wolff, to put it very simply to you is I do not believe that the use of the information charged the way it did in the instructions is a valid way of submitting the case. I permitted the case to go to the jury. I always have the opportunity to correct what I think is a mis-submission of the case.

... Up to this point I've assumed the State would correct the Information and that he would not stand with what I call a roving commission using the charge "sexual activity." I think they have to get within the meaning of the statute.... I'm going to give them the opportunity because *I'm very mindful of the fact that the state will have the right to appeal once I do dismiss this case* and I intend for it to be in a posture that when it goes up in their appealing the dismissal there be a clean record. *I'm going to give them every opportunity in the world to get the Information in the correct form. If they can't do it, then I'm going to dismiss the case.*

The court then sustained the motion for new trial on Count I and granted the prosecution five days to file an amended information. The operative portion of the "third amended information" then filed charges that the defendant violated § 568.060, RSMo 1986, by:

> acting in concert with Patsy J. Urban, *knowingly photographed* . . ., a child less than seventeen years old, engaging in nudity depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction. (Emphasis supplied).

The defendant was afforded a preliminary hearing on this third amended information.[2] Trial proceeded before a different judge, without a jury. The parties agreed to submission on the evidence taken at the first trial. The defendant was found guilty and sentenced to three years' imprisonment.

The defendant claims that the continued prosecution is barred under the double jeopardy clauses of the federal and state constitutions. Our state constitutional provision (Article I, Section 19) is more limited than the federal and could apply only to Count II, as to which the defendant was acquitted. We conclude, however, that the federal constitutional claim has merit, particularly in the light of the recent decision in *Grady v. Corbin*, ___ U.S. ___, 110 S. Ct. 2084 (1990).

In *Grady*, following an automobile accident, the driver was charged with reckless driving and driving while intoxicated. Before he was brought to court on the charges, the victim died. The defendant then pleaded guilty to the pending charges and paid a fine. The New York Court of Appeals held that he could not be prosecuted for manslaughter and the Supreme Court of the United States affirmed, holding that he could not be again tried on charges arising out of the identical conduct that had been the subject of the guilty pleas. The court pointed out that the state intended to prove the very same conduct charged in the proceedings in which the guilty pleas were entered, the driver's recklessness and intoxication, to support the manslaughter charge. That holding clearly applies to the case before us, in which the record of the first trial was used in the second and the state introduced no additional evidence. The defendant was charged in both trials on account of the same conduct, this being the taking of the photographs.

We of course recognize the rule that a defendant who is found guilty and asks for a new trial cannot plead double jeopardy when tried again. Although a new motion for new trial was filed, and the trial judge purported to sustain it, it is clear that the judge was of the opinion either

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[2]The third amended information was later modified, in immaterial respects, by affidavit.

than Count I did not state an offense,[3] or that the evidence did not support the charges made. Otherwise there would be no basis for dismissal, which he said would follow if the information were not amended.[4] Clearly the court was not willing to permit a new trial on the information as it then stood.

Being of the views he indicated, the judge should have terminated the first proceeding either by dismissing the remaining count or by entering judgment of acquittal. If the information did not state an offense, the court had no jurisdiction to proceed.[5] If the evidence was not sufficient to support the verdict, then the defendant was entitled to judgment of acquittal, and the state was not entitled to proceed with a new trial.[6] The trial court's ruling effectively terminated the first trial. Rule 23.08 permits amendment of an information only before verdict. The state, as the trial court recognized, could have appealed.[7] Its failure to do so, and its election to file a further amended information, operated an an abandonment of Count I of the initial proceedings.[8] This Count I, then, must be treated as though it had never been filed.

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[3] The sufficiency of the information was challenged by motion before trial, at the close of the plaintiff's case, and at the close of all the evidence.

[4] The dissent suggests that we intimate that the evidence was insufficient. We have no occasion to express an opinion on this point. We do observe that the trial court thought that there should be a dismissal. The only grounds we can fathom for such ruling would be insufficiency of the information or insufficiency of the evidence.

[5] *State v. Harrison*, 276 S.W.2d 222 (Mo. 1955); *State v. Gladies*, 456 S.W.2d 23 (Mo. 1970). *State v. Gilmore*, 650 S.W.2d 627 (Mo. banc 1983), appeal after remand 697 S.W.2d 172 (Mo. band 1985); *cert. denied* 476 U.S. 1178 (1986).

[6] *Burks v. U.S.*, 437 U.S. 1 (1978); *Greene v. Massey*, 437 U.S. 19 (1978). MO. Ct. 27.07.

[7] §§ 547.200, 547.210, RSMo 1986.

[8] Rule 29.14, dealing with proceedings following the arresting or setting aside of a judgment, clearly demonstrates that a new prosecution is necessary. The rule deals with the circumstances in which the defendant may be further detained.

The dissent argues loudly and at length that Count I was properly charged and supported by the evidence, so that dismissal by the court would be improper. We do not need to decide this question, and do not decide it. Instead of abiding the dismissal and appealing, the prosecution filed a new information setting forth different charges, thereby abandoning Count I. There was, then, no effective charge to support a new trial.

The allegations of the third amended information, even though laid under the same statute, constitute a substantial departure from the charges in the first trial. The substance of the third amended information could have been included in the initial charges, because it involved different statutory violations arising out of the same conduct. *Missouri v. Hunter*, 459 U.S. 359 (1983). Under *Grady v. Corbin*, the charges of the third amended information could not be the basis for an additional prosecution, once the initial prosecution for the same conduct terminated. Treated as a new proceeding, as it must be, the second trial is barred by principles of double jeopardy, inasmuch as the first trial resulted in a verdict and final judgment was entered on one count of that verdict. It makes no difference whether the first trial resulted in a conviction, as in *Grady*, or, as here, in an acquittal. Under *Grady* the state may not prosecute the defendant seriatim for the same conduct by employing different statutory alternatives.

The dissent is predicated on the mistaken assumption that a judge in a criminal case has the same authority that a judge in a civil case has — to vacate a judgment and permit the filing of an amended pleading after trial. The trial judge apparently took the same erroneous view. This procedure is not known to Missouri criminal procedure. By filing the amended information the state abandoned the existing prosecution and commenced a new one. This was quite in order, so long as the bar of double jeopardy could be overcome.

We are not called upon to, and do not, express an opinion as to what the situation would be if a defendant had been found guilty on one or more counts of an information, without any acquittal, and all convictions had been set aside because of insufficiency of the information. There it could be argued that vacation of the conviction or convictions

on the defendant's motion did not subject the defendant to such jeopardy as to preclude further trial on amended charges. *Cf. Lee v. United States*, 432 U.S. 23 (1977). Nor would our holding apply to a case in which there had been an acquittal of one count and conviction on another properly joined count that was then set aside for trial error, with a new trial being held on the same charge. In that situation the state should be entitled to proceed to judgment on each count properly stated and joined. Here it is patent that the defendant was in jeopardy of the charges in Count II. Because that count and the present charges depend on identical conduct, *Grady v. Corbin* applies to prevent the processing of an additional charge.

We believe that the second prosecution also runs afoul of the holding of *State ex rel. Westfall v. Campbell*, 637 S.W.2d 94 (Mo. App. 1982), which we approve. There the court quoted several cases for the proposition that

> If a statute makes criminal the doing of . . . several things disjunctively, there is but one offense, which may be committed in different ways. . . .

Id. at 97. It also held that

> under the double jeopardy doctrine, the state cannot split a single crime and prosecute it in separate parts; . . . otherwise the state could prosecute the defendant as many times as there are parts into which an offense is susceptible of being divided.

Id.

There the defendant had received a stolen collection of rare coins. He was tried and convicted of transferring a portion of the coins. He was then discovered to be in possession of the balance of the collection, and was charged with receiving stolen property by retaining the remaining coins. The state conceded that he had received all of the coins at the same time. The trial court dismissed the second proceeding on double jeopardy grounds and the court of appeals refused to disturb the ruling. The case is manifestly like the one before us, in which the state has presented multiple charges, in different proceedings, all based on photographs taken and developed together.

The question before us is not whether the state may impose cumulative punishments. *Missouri v. Hunter*, 459 U.S. 359 (1983), teaches that the legislature may prescribe cumulative punishments for different aspects of the same conduct, if it so intends. That case involved a single trial on several counts of a single information. Different considerations are involved when the state tries to prosecute the same conduct in separate trials. In addition to *Campbell* and *Grady*, see *State ex rel. Bulloch v. Seier*, 771 S.W.2d 71 (Mo. banc 1989).

The state cites *State v. Bolen*, 731 S.W.2d 453 (Mo. App. 1987), which held that a defendant could be charged in the same trial with sodomy and attempted sodomy, so that a conviction of the latter offense could stand even though there had been an acquittal of the sodomy charge. The case is distinguishable because it involved a single trial rather than successive trials.

Our holding is dispositive of the case, and so we do not need to consider the numerous additional points raised by able counsel. Suffice it to say that the state would face numerous additional hurdles. We of course refrain from considering constitutional challenges to statutes when other points suffice for decision. That is the situation here. Nor is there any need to consider the sufficiency of the evidence to support conviction, which is the turning point of the court of appeals opinion.

The judgment of conviction is reversed and the case is remanded with directions to enter judgment of acquittal.

/s/ Charles B. Blackmar, Chief Justice

Robertson, Higgins, Covington, JJ.,
and Seiler, Sr. J., concur; Rendlen,
J., dissents in separate opinion
filed; Holstein, J., dissents and
concurs in separate dissenting
opinion of Rendlen, J.
Billings, J., not sitting.

SUPREME COURT OF MISSOURI

en banc

No. 72282

STATE OF MISSOURI,
Respondent,

vs.

DAVID URBAN,
Appellant.

DISSENTING OPINION

(Filed: September 11, 1990)

I respectfully dissent.

The majority erroneously treats Urban's conviction as though barred by the double jeopardy provision of the United States Constitution and, in so doing, reverses the trial court's judgment and orders defendant acquitted.

This case involves a defendant who, in concert with his wife, arranged a disgusting photographic session, displaying an infant child, while nude, engaged in various offensive poses and repugnant activities with a nude adult woman. The 33 photographs and the testimony tell the story with deplorable clarity that the infant child was directed and posed by the adults who employed a variety of props to accomplish their aims, including marshmallows, a rubber ball and a small dog. Defendant photographed these graphic tableaus, contrary to the criminal statutes of our state, which included two particularly egregious acts for which he was charged and tried before a jury in April, 1987. The charges tried to the jury were in two counts.

COUNT I — "ABUSE OF CHILD"

Section 568.060, RSMo 1986, proscribes filming a child less than seventeen years of age engaging in prohibited sexual activities or the

simulation of such an act for the purpose of photographing the act. The specific allegations of the information were:

> . . . the defendant, acting in concert with Patsy J. Urban, photographed A.G., a child less than seventeen years old, engaging in the simulation of a sexual act, to-wit: A.G. *touching Patsy J. Urban's vaginal area,* . . .

(Emphasis added.)

That charge was submitted to the jury by instruction in the format of M.A.I.-CR 2d 22.12.2, which in pertinent part provided:

> If you find . . . the defendant photographed A.G. engaging in the simulation of the sexual act of *touching Patsy J. Urban's vaginal area:* and
>
> Second, that A.G. was then less than seventeen years old, then you will find the defendant guilty under Court I of abuse of a child. (Emphasis added.)

The jury found defendant guilty and the record reveals abundant evidence supportive of the verdict. The majority, by down playing the record, insinuates the evidence perhaps did not support submission of the case and, in so doing, casually refers to the situation as photographs "showing the defendant's wife and grandson, aged 15 months, in various unclad poses." This skillful understatement would be of little moment were it not followed by the assertion that the trial judge, when sustaining the motion for new trial as to Count I, "was of the opinion either that Count I did not state an offense or *that the evidence did not support the charges*." (Emphasis supplied.) Slip opinion, page 6-7.

With the purpose of hopefully avoiding the necessity of attaching 33 vivid colored photographs introduced in evidence, suffice it to say that no reasonable person could suggest these photographs are other than disgusting exhibitions of a woman with an infant manifesting a studied intention of the woman and the photographer to infringe on the rights of this small child. Further, I challenge the majority to dispute the fact that one of the photos served as the precise basis and proof of the charge of photographing a child "engaging in the simulation of the

sexual act of touching Patsy Urban's vaginal area." This was the specific proof of the key element of the charge under Count I. The offending photograph graphically depicts Patsy Urban with legs spread, her private part displayed to the camera and laughing (or at least mouth agape) as the child enacts this sad performance. This and the other photos are piously characterized by defendant as the grandmother and grandson "engaged in playful activity before the child's afternoon bath." If there was a "bath," the photos of that scene are not of record; it exceeds the bounds of credulity to suggest that defendant's preposterous excuse be deemed plausible. The evidence supports the allegation of the information's first count and its submission under the referenced instruction.

The majority states that the trial judge when he "purported to sustain" the motion for new trial "was of the opinion either that Count I did not state an offense or that the evidence did not support the charges made. . . . If the evidence was not sufficient to support the verdict then the defendant was entitled to judgment of acquittal and the state was not entitled to proceed with a new trial," citing *Burks v. U.S.*, 437 U.S. 1 (1978). The majority misses the mark by a substantial margin when it suggests the possible application of the holding in *Burks v. U.S.*, for indeed, the charge was specific, the proof precise, and the verdict of guilt on Count I fully justified by the record.

The trial court's comments made when granting a new trial on Count I expressed concern centered on the *instructions* and the allegations of the *information*. He perceived what he characterized as a "roving commission" and though his somewhat rambling comments[1] at the time he set aside the verdict are less than models of clarity, the fact remains that he set aside the conviction, granted a new trial and allowed the state five days to replead. It is apparent the uncertainty he expressed was not shared by the jury. More important, the sufficiency

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[1] Among his comments, the trial court remarked: "I do not believe that the use of the information charged the way it did in the *instructions* is a valid way of submitting the case. I permitted the case to go to the jury. I always have the opportunity to correct, what I think is a mis-submission of the case. That's what I'm doing." (Emphasis supplied.)

of the information and the efficacy of instructions under Count I are questions of law. I submit they were proper in form and content, and the majority does not seem inclined to dispute this conclusion. Most certainly, on the retrial of the issues raised in the amended information, the photograph of the nude child touching the vaginal area was not barred by double jeopardy doctrine. The state was given five days to refile an information; this was done and the newly amended information charged:

> the defendant, David L. Urban, acting in concert with Patsy J. Urban: In violation of Section 568.060, RSMo, committed the Class C Felony of Abuse of a Child, punishable upon conviction under Sections 558.011.1(3) and 560.011, RSMo, in that on or between the 1st day of April, 1986, and the 30th day of April, 1986, in the County of Boone, State of Missouri, the defendant, acting in concert with Patsy J. Urban, knowingly photographed [A.G.] a child less than seventeen years old, *engaging in nudity* depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction; and all against the peace and dignity of the State. (Emphasis added.)

Having waived a jury, defendant was tried this time by the court, and again found guilty under the allegations of the amended information.

COUNT II — "PROMOTING CHILD PORNOGRAPHY"

The second charge submitted to the jury under Count II of the information in April, 1987, fell under a different statutory section which prohibits "Promoting Child Pornography." Under Section 573.025, RSMo 1986, a person commits the crime of promotion of child pornography if he knowingly photographs child pornography, and here the information charged:

> . . . the defendant, acting in concert with Patsy J. Urban, knowing its content and character, photographed child pornography consisting of [A.G.] *touching the breasts of* Patsy J. Urban, and all against the peace and dignity of the State. (Emphasis added.)

That specific charge was submitted to the jury by the appropriate instruction which in pertinent part provided:

> . . . the defendant photographed certain material consisting of [A.G.] *touching the breasts of Patsy J. Urban*, and
>
> Second, that such material depicted sexual contact, and, . . . (Emphasis added.)

Here, too, the record discloses more than ample evidence supporting this count's submission. There were 19 explicit photographs depicting the key element of the charge of "touching the breasts" in a variety of unseemly poses. As aptly noted by the dissent of Judge Lowenstein, who disagreed with the reversal of the conviction by the 6-5 margin in the Court of Appeals, Western District, when commenting on the facts of the case under the applicable statute: "I cannot imagine the legislature intended to allow or condone naked infants to be photographed munching sweets off their naked grandmother's nipples. The judgment should be affirmed." Nevertheless, the jury acquitted the defendant on this charge and it may not be retried.

The acquittal terminated the charge under § 573.025 (Count II), but as noted above, the amended information was filed within five days from the order granting the new trial on Count I. The amended information was brought under the same statutory section as that of Count I though the operative feature of the offense was nudity, vis-a-vis touching the vaginal area in the original information. Defendant was convicted in the ensuing trial on April 14, 1988, and from that conviction, he appealed.

The majority mistakenly relies on *Grady v. Corbin*, 110 S.Ct. 2084 (1990), for the proposition that the new trial was barred by double jeopardy doctrine. In that case, Corbin, following involvement in an auto accident, was charged in case #1 with "driving while intoxicated." He was separately charged in case #2 with "failing to keep to the right" of the median. Defendant pled guilty to both misdemeanor charges. Thereafter, the state by indictment charged Corbin with assault and reckless manslaughter in which the gravamen of the charges were (1) driving while intoxicated (the same as case #1); (2)

failing to keep to the right of the median (the same as case #2); and (3) driving too fast.

The majority of the court made clear that the indictment for matters arising from the auto accident was not per se prohibited by double jeopardy considerations, but instead only that conduct for which defendant had been put in jeopardy, i.e., (1) *intoxicated* driving, and (2) failing to keep to the *right*, and that evidence of this conduct was impermissible. However, as to the new charge of driving too *fast*, the holding of *Corbin* would not bar a subsequent prosecution on that ground. As stated by Justice Brennan, author of the 5-4 majority opinion, the *Corbin* holding would not stand in the way of a later prosecution on the new charges of homicide and assault if the evidence as to the (1) *intoxication* and (2) not keeping to the *right* was not relied on by the state; however, evidence of (3) driving too *fast* may be adduced and could serve as the evidentiary base for the new trial. This is clearly enunciated by the majority at 110 S.Ct. at ___:

> This holding would *not bar* a *subsequent prosecution* on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (i.e., if the State relied solely on Corbin's *driving too fast* in heavy rain to establish recklessness or negligence). (Emphasis added.)

In the case *sub judice*, we have two original charges under separate statutes each with discrete proof of its identifiable act of misconduct. Examining this evidence, it should be reiterated that proof of Count I (touching of the vaginal area) is found in photograph #1.[2] This was

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[2]For ease of understanding, the 33 objectionable photographs in the counts to which they relate are as follows:

Count I	
Photograph #1	[Exhibit 10-0]
Count II	
Photographs ##2-20	[Exhibit 10 D-G, 10 I-L, 10 N, 10 Q, 10 S, 12 N-U]
Amended Information	
Photographs ##1+21-33	[Exhibit 10-O, 10 A-B, 10 H, 10 M, 10 O-V, 10 X, 12 L-M, 12 V-X]

properly admitted in the first trial resulting in defendant's conviction from which the new trial was ordered. No possible objection based on double jeopardy considerations could exclude it in the new (second) trial and this offensive photo shows Patsy Urban and A.G. *nude* in the manner described and accordingly was material to the issues in the amended information.

As to Court II (touching the breasts), nineteen photographs (#2 through #20) were admitted in the first trial depicting this specifically charged act of misconduct. Defendant's acquittal on this count would seem to serve as a basis for objection to and refusal of photos #2 through #20 in a subsequent trial.[3]

The amended information charging as its essential act of misconduct the photographing of the child "engaging in nudity" is depicted in photographs #21 through #33. These 13 separate photos are evidence of "nudity" and solidly analogous to the evidence of "speed" in *Corbin*. As in *Corbin* where the prior conviction of (1) intoxicated driving and (2) not keeping to the right excluded evidence of those acts, exhibits #1 and #21 through #33 are not barred by double jeopardy considerations. If the trial court erred in allowing #2 through #20, this is an evidentiary error and its prejudicial effect should be weighed. Keeping in mind the case was court tried, if the admission of #2-#20 is deemed erroneous and prejudicial, the cause should be remanded for

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[3] Arguably, the evidence of photos #2-#20 could be admitted in the second trial charging photographing of the child nudity depicted for the purpose of sexual stimulation or gratification because photos #2-#20 taken serially over a space of time display vulgar nudity and would be relevant to that fact issue as well as the issue of defendant's "knowing" what he was photographing and the "purpose" and intent for so doing. Under *Louis Steinbaum Real Estate Co. v. Maltz*, 247 S.W.2d 652 (Mo. 1952), evidence admissible for one purpose is not necessarily excluded because it is inadmissible for another purpose. *Id.* 656.

Similarly, evidence of "other crimes" though typically inadmissible may be shown in a proper case to demonstrate motive, intent or the common scheme exceptions. *State v. Kornegger*, 255 S.W.2d 765, 768 (Mo. 1953) (Court noting this exception is frequently recognized for "crimes involving sexual relations such as adultery, incest, sodomy, seduction, rape and lewdness.").

consideration of the other evidence, sans #2 through #20 or, at the most, reversed and remanded for a new trial with direction to exclude #2 through #20 in any subsequent proceeding.

_____

ALBERT L. RENDLEN, JUDGE

APPENDIX C

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD40852

Circuit Court
No. CR86-113595

STATE OF MISSOURI,
Respondent,

VS. (BOONE)

DAVID URBAN,
Appellant.

ORDER

(Filed: December 5, 1989)

NOW ON THIS DAY the Court considers Respondent's Motion for Rehearing/Transfer in the above-styled case, and being fully advised in the premises, the motion is overruled for lack of jurisdiction, said case having been transferred to the Missouri Supreme Court by certification of a dissenting judge.

Dated this 4th day of December, 1989.

/s/ ANTHONY P. NUGENT, JR.
CHIEF JUDGE

cc: John Munson Morris III
Donald L. Wolff
William D. Rotts
Clerk, Boone County Circuit Court

APPENDIX D

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 40852

OPINION FILED:
NOVEMBER 14, 1989

STATE OF MISSOURI,
Respondent,
v.
DAVID L. URBAN,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF BOONE COUNTY

THE HONORABLE THOMAS BROWN, III, JUDGE

Before Nugent, C.J., P.J., Shangler, Turnage, Clark, Manford, Kennedy, Lowenstein, Berrey, Gaitan, Fenner, and Ulrich, JJ.

The defendant David L. Urban, appeals a conviction on a charge of child abuse under § 568.060, RSMo 1986, entered on a trial to the court, for which he was sentenced to imprisonment for three years. The information charged that

> the defendant, acting in concert with Patsy J. Urban, knowingly photographed [A.G.], a child less than seventeen years old, engaging in nudity depicted for the purpose of sexual stimulation of any individual who may view such depiction. . .

The photographs, taken by David L. Urban, a professional photographer and step-grandfather of the child, depicted the domestic scene wherein Patsy J. Urban — unclad — bathed the grandchild A.G., then fifteen months of age — also unclad.

The conviction for abuse of a child under § 568.060 culminates multiple prosecutions for the same conduct and the same depictions under different statutory components. The defendant was charged

under § 573.025, in concert with Patsy J. Urban, with promoting child pornography by photographing A.G. touching the breasts of Patsy J. Urban. The defendant was acquitted of the charge of that offense by a jury. The defendant by separate count was charged under § 568.060, in concert with Patsy J. Urban, with abuse of a child by photographing A.G. engaging in the simulation of a sexual act — A.G. touching the vaginal area of Patsy J. Urban. The defendant was found guilty of that charge by a jury. The court nevertheless granted a new trial on the ground that the offense as charged by the information was not "within the meaning of the statute [§ 568.060]," and so the instructions based on the information were an improper submission of the case. The defendant acquiesced in the denial of the motion for judgment of acquittal and in the grant of a new trial on that count, and then in the amended information which formed the basis for the trial to the court and adjudication of guilt on that count under § 568.060, as reformulated.

On this appeal the defendant does not seek a new trial but dismissal of the charge and conviction on multiple grounds. He asserts that § 568.060 does not adequately define how photographs of an unclothed pre-pubertal child constitute child abuse or child pornography, and so is overbroad and vague, and deprives him of due process of law, [and presumably the protection of the First Amendment]; hence, the information based on the statute does not state a lawful offense. These were the precise claims of constitutional infirmity our supreme court en banc addressed, and rejected, in State v. Helgoth, 691 S.W.2d 281 (Mo. banc 1985).

The charge of the information and the adjudication of guilty by the court against the defendant rest on this component of § 568.060:

> 1. A person commits the crime of abuse of a child if he:
>
> . . .
>
> (2) Photographs . . . a child less than seventeen years old engaging in a prohibited sexual act . . .
>
> 2. . . . "prohibited sexual act" means any of the following, whether performed or engaged in either with any other

> person or alone: . . . nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.[1]

The quiddity of offense under that constituent of § 568.060 was laid down in *Helgoth* in the course of the validation of that statute against the claims of constitutional vagueness and overbreadth. To the contention that the statute was without sufficient guide, either to the public or to those to whom the law confides its enforcement, "as to what sort of nudity will result in the 'sexual stimulation or gratification of any person,' " the court responded [at 283]:

> The effect of the statute as is applies to the defendant's actions is to prohibit photographing nude children with the specific purpose that the depictions thereby created be used for sexual stimulation or gratification *It is the intent of the photographer with which we are concerned* in this case. *The standard employed is a subjective one,* . . . [emphasis added].

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[1] The full text of that section provides:

1. *A person commits the crime of abuse of a child if he:*

(1) Knowingly inflicts cruel and inhuman punishment upon a child less than seventeen years old, or

(2) *Photographs* or films *a child less than seventeen years old engaging in a prohibited sexual act* or in the simulation of such an act or who causes or knowingly permits a child to engage in a prohibited sexual act or in the simulation of such an act for the purpose of photographing or filming the act.

2. As used in this section "*prohibited sexual act*" *means any of the following, whether performed or engaged in either with any other person or alone:* sexual or anal intercourse, masturbation, bestiality, sadism, masochism, fellatio, cunnilingus, any other sexual activity or *nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.*

3. Abuse of a child is a class C felony, unless in the course thereof the person inflicts serious emotional injury on the child, in which case the crime is a class B felony. (Amended by L. 1984, p. 753, H.B.No. 1255, § 1.) [emphasis added].

Note: The charge of the information returned against the defendant deletes "or gratification" as an element of the statutory offense.

It is the intent to photograph a nude child with the purpose that the depiction will be used for the sexual stimulation or gratification of the viewer, therefore, that provides the *scienter* of the offense. Cognately, it is the exploitation of the nudity of the child that the statute addresses. It is this rationale that the activity § 568.060 prohibits relates to conduct and not speech that also responds to the contention in *Helgoth* that the statute unduly affects protected speech, and hence violates the First Amendment. 691 S.W.2d at 284[4].

The statute on which the conviction rests, and which *Helgoth* construes, is among that spate enacted consequent to the holding by the United States Supreme Court in New York v. Ferber, 458 U.S. 747 (1982) that the interest of a state in the protection of the mental, emotional and physical health of its children outweighs the claim for protection of child pornography under the First Amendment. *Id.* at 758: *Helgoth* at 284; 1984 U.S. Code Cong. & Admin. News 492. Accordingly, the enactment of § 568.060 by our Legislature expresses "a governmental objective of surpassing importance" — the protection of its children from exploitation and abuse by sexual performances. *Ferber* at 757; *Helgoth* at 285.

The defendant does not argue, as such, that the evidence to the trier of fact was not sufficient for the adjudication of guilt beyond a reasonable doubt of the offense as charged by the information. He argues, rather, that the acts alleged against him do not constitute a crime, and therefore the information must be dismissed and the conviction vacated. He postulates that the information charges Urban with the crime of photographing child nudity, but that the only definition the statutes render for *nudity* in terms of child pornography relates to the display of *post-pubertal* human genitals[2], and since the nudity photographed by Urban was pre-pubertal, the information did not state a charge nor the judgment amount to a criminal conviction. The defendant notes that the only conviction our decisions report and

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[2] *Pornography and Related Offenses Chapter* 573 defines *nudity* as: "the showing of post-pubertal human genitals or pubic area, with less than a fully opaque covering." 573.010(7) RSMo 1988 Supp.

sustain under § 568.060, State v. Helgoth, 691 S.W.2d 281 (Mo. banc 1985), involved photographing the nudity of a post-pubertal child.

That argument merely revisits and recasts the contention that the failure of § 568.060 to define *nudity* renders that statute void for vagueness as applied to the conduct charged against Urban. It is an argument our supreme court en banc rejected in *Helgoth*. The focus of the photographs in that case, indeed, were the pudendum and bare breasts of a post-pubertal child. The condition of an arrived puberty, however, did not bear as an element of the offense under that application of § 568.060, but only as a circumstance to prove *scienter*: that the nudity was depicted for the purpose of sexual stimulation or gratification of any person who may view the photograph. It is implicit in the rationale of opinion that *Helgoth* understands the *nudity* of the statute in the common sense of *nakedness*. That is because § 568.060 and the offenses under chapter 573 are not *in pari materia*.

The reason is evident. Chapter 573 — *Pornography and Related Offenses* — as the title renders, includes both crimes of child pornography and of obscenity. Obscenity is not within the compass of protected speech, and neither is child pornography. Roth v. United States, 354 U.S. 476, 485 (1957); New York v. Ferber, 458 U.S. 747, 764 (1982). However, the tests are different for unprotected obscenity and for unprotected depictions of sexual activity involving children. To pass constitutional muster, an obscenity statute must be "limited to works which, taken as a whole, appeal to the prurient interest in sex. which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24 (1973). The interest of the state in protecting the welfare of its children against sexual exploitation is so compelling, however, that the *Miller* obscenity formulation of prurience, offensiveness and lack of value of the perfc rmance when take as a whole become irrelevant as to what constitutes child pornography. New York v. Ferber, 458 U.S. at 761. In order to pass constitutional muster as a criminal sanction for child pornography, the statute need not require the proof of obscenity, but some element of *scienter* on the part of the defendant and that the category of sexual conduct proscribed also be suitably limited and

described. *Id.* at 764-765. Chapter 573 applies this distinctive scheme of constitutional principle to the criminal sanctions it enacts. The obscenity components of the chapter are expressly made subject to the proof of the *Miller* standard [§ 573.050.1], and the child pornography components are expressly relieved of that standard [§ 573.050.4]. *Nudity* is a component only of the proof of the obscenity offenses the chapter enacts [§ 573.010 (10)], and hence the definition of *nudity* as the display of *post-pubertal* human genitals or pubic area [§ 573.010 (7)] does not affect the child pornography offenses of the chapter. Contrary to the Urban argument, therefore, the definition of *nudity* Chapter 573 renders is not *in pari materia* with § 568.060 under which he was charged and convicted or with any other child pornography section.

The appeal contends only that the information does not charge a crime, and not that the evidence did not suffice to submit the charge. We have determined, under the authority of *Helgoth*, that § 568.060 validly enacts the crime of child pornography, and that the allegations of the information sufficed as a charge of such an offense. A criminal conviction that does not rest upon proof beyond a reasonable doubt of every fact essential to the crime charged, however, not only constitutes plain error, but also violates the due process clause of the fourteenth amendment. Jackson v. Virginia, 443 U.S. 307, 318 (1979); State v. McClunie, 438 S.W.2d 267, 268[1,2] (Mo. 1969). We notice that possibility of error sua sponte, albeit unpreserved and unassigned, not only as a matter of constitutional principle but also of plain error. State v. Hurd, 657 S.W.2d 337, 338[1,2] (Mo. App. 1983). We review the evidence as well to give perspective to a rationale of decision otherwise truncated by the presentation of the points on appeal.

The judgment of conviction Urban now appeals was entered on the retrial of offense for abuse of a child by photographing under § 568.060. The first trial of the offense under that section was tried to a jury and resulted in a verdict of guilty. That conviction was set aside by the trial judge, and a new trial granted. The judge to whom the case was retried was not the same judge who presided over the jury and set aside the verdict. The evidence on the retrial was as stipulated by the parties, and included forty-eight photographs, the transcript testimony

of the mother and father of the infant, the defense pediatrician and child psychologist witnesses, and other excerpts from the original trial transcript. Neither the defendant David Urban [step-grandfather of the infant] nor Patsy J. Urban [grandmother of the infant], cited by the information as an actor in concert with the defendant, testified at the original trial. Accordingly, the stipulation does not include their testimony as such.

Where a criminal defendant waives a trial by jury and submits the adjudication of the offense to the court, the findings of the trial court have the force and effect of the verdict of a jury. Rule 27.01(b). The question on appeal then becomes whether there was substantial evidence to support the finding of guilty entered by the trial court. State v. Giffin, 640 S.W.2d 128, 130[1,2] (Mo. 1982). In that determination we accept as true all the evidence that tends to prove guilt together with all the reasonable inferences favorable to the prosecution that the evidence yields, and disregard all unfavorable inferences. State v. Morgan, 592 S.W.2d 796, 805[6] (Mo. banc 1980). In a case tried without a jury, it is the role of the trial court as the arbiter of the facts to resolve any conflict or inconsistency in the versions of the evidence, and assessments of credibility are binding on appeal. State v. Isom, 660 S.W.2d 739, 742[6,7] (Mo. App. 1983). It is the opportunity to view the witnesses that validates the special deference due the factfinder on matters of credibility. State ex rel. Busch by Whitson v. Busch, No. 71141 slip op. at 4 (Mo. banc filed September 8, 1989) (Blackmar, J. concurring). Where, however, the evidence consists altogether of transcript excerpts, writings and photographs not in contradiction, there is no inconsistency for the trial court to resolve or credibility to assign, but only inferences to be drawn from the evidence as received. In such a case, the role on appeal is to determine whether these inferences upon which the finding of guilty rests are supported by substantial evidence. City of Kansas City v. Oxley, 579 S.W.2d 113, 115[2] (Mo. banc 1979); State v. Munson, 714 S.W.2 515, 521 (Mo. Banc 1986). "[C]ourts can and regularly do gauge the sufficiency of the evidence without intruding into any legitimate domain of the trier of fact. . . ." Jackson v. Virginia, 443 U.S. at 321. In the circumstances of this appeal, the essential inquiry is whether there was substantial

evidence to prove the element of offense that the defendant photographed the nudity of the child "for the purpose of sexual stimulation or gratification of any person who may view such depictions." § 568.060.

In the context of this inquiry, *substantial evidence* means "evidence from which the triers of fact reasonably could find the issue in harmony therewith." State v. Gregory, 339 Mo. 113, 96 S.W.2d 47, 52[1-4] (1936). It means, even more simply, evidence that has probative force on the issues. The review for *substantial evidence* depends in some measure upon the degree of persuasion required of the trier of the fact. *Id* at 52[5,6]:

> In a criminal case liberty and sometimes life are involved, and there cannot be a conviction except upon a finding of guilt beyond a reasonable doubt. Necessarily, therefore, *it becomes the duty of an appellate court as a matter of law to decide whether the evidence was sufficient to induce a belief of the defendant's guilt beyond a reasonable doubt in the minds [of the triers of fact]*. [emphasis added].

See also City of Kansas City v. Oxley, 579 S.W.2d at 115[2]; State v. Siraguso, 610 S.W.2d 338, 343 n.3 (Mo. App. 1980). In that assessment, where two equally valid inferences can be drawn from the same evidence, one probative of guilt and the other not, the evidence does not establish guilt beyond a reasonable doubt. State v. Prier, 634 S.W.2d 197, 200[3-5] (Mo. banc 1982).

The evidence most favorable to the judgment of conviction shows:

The defendant David Urban is a professional photographer who maintains a studio in his residence, equipped with facilities to develop, print and process film. Urban lives there with his wife Patsy. Patsy has a daughter T.G., who is the mother of the infant A.G., then fifteen months old. On the morning of April 19, 1986, T.G. delivered her son to her mother for the day. She brought along a change of clothes for the boy, a small ball to play with, and a container of miniature marshmallows as a snack for him. Patsy Urban planned a full day of activity for her grandson, including lunch at McDonald's and a romp

in the park. She also agreed with the request of her daughter to give A.G. a bath before the parents returned for him late that afternoon. The bathroom at the Urban home is tiny. It is so small that Patsy had to undress A.G. in the adjoining living room before she could bathe him.

David Urban returned home that afternoon from a commercial photograph assignment to find Patsy and the fifteen month old grandson totally unclad, playing on the floor together. He took a number of photographs of his wife and step-grandson in that state of undress. [The photographs will be described fully in the course of opinion.] Although the defendant had the facilities to develop, process and print the exposure at the home, the two rolls of colored film were taken instead to a local K-Mart for processing. K-Mart dispatched the exposures to an independent laboratory for developing. The personnel of the laboratory reported the content of the photographs to the Boone County Sheriff, and a police investigation ensued. It culminated in the arrest, formal charge and criminal prosecution of David Urban for the crimes of child abuse and child pornography related to the photographs.

The photographs are the essential proof on which the judgment of conviction rests. It was stipulated that the defendant David Urban took the thirty-seven color photographs received in evidence. There is no dispute — although not a matter of stipulation — that the scenes they depict are sequences taken of the grandmother and child before the bath was administered. There is no dispute either that the defendant came upon the domestic scene upon return from a commercial assignment so that his camera was still at hand and still contained unused film. He promptly took the thirteen exposures that remained, reloaded, and took twenty-four more.

The two principals in the photographs are the grandmother and the child A.G. They are completely unclad in all but three of them. In two the child is covered by a diaper, and in the other, the child, grandmother and other figure are fully clothed. The focal distances of the photographs vary. In about fifteen of them, only the upper body of the boy is displayed, and nudity can only be surmised. In all of the, however, the nudity of the grandmother is a matter of display. They show her in various postures, recumbent. In several of the, the naked child sits

astride the lap of the grandmother, touching the nipples and breasts of the grandmother, kissing them, then eating a miniature marshmallow placed on the nipple of a breast, then kissing her on the lips. In yet others, the grandmother lifts her breasts upward toward the child [seemingly to offer a marshmallow], and the child reaches out. In several others, the child holds a little ball and places it atop the breasts of the grandmother offers him for that purpose. In one particular photograph, the grandmother is seen virtually supine. Her knees are bent upwards as her feet rest on the sofa. Both legs are abducted so that the pubic area is exposed. The vulva would be completely discernible but for the right hand of the child, which is seen clutching the little ball, and the index finger, both of which superimpose the grandmother's pubic hair.

That kind of byplay and antic were usual between the child and parents. That was the stipulated evidence of T.G., mother of the infant, and witness for the prosecution.

Q. Look at all the pictures again, T. . . ., and for another time on State's Exhibit 12. Can you tell the Court, please, whether or not you have allowed your child to touch you in the very same ways that are depicted in that exhibit?

A. He touched me like that every time I have taken a bath with him or played with him before bath time.

Q. And has he touched your breasts in the same manner as depicted in all of these photos?

A. The exact same manner.

Q. Let me show you State's Exhibit 10 and ask you the same question. Has your child touched you in exactly the same manner as depicted in all of those photographs?

A. Yes, several times. With his father too.

Q. With his father too. Has he ever touched you in the pubic area?

A. When we have taken baths together, he has many times.

On the day she delivered the child to the grandmother for keeping, T.G. asked the grandmother to give the child a bath so that he would be ready when she and her husband came for him. The child and grandmother were to play in the park all afternoon, and he would need a bath.

The step-grandfather, defendant Urban, T.G. related, has photographed the family and its members many times. Those poses and portraits were all taken in the studio downstairs, where all the professional equipment is kept. There is none upstairs where the depictions for which the defendant was prosecuted were taken. All of the family portraits are of proof size, the standard employed by professional photographers. Some of them depicted the child A.G. in the nude at bath, "[f]rom the night he was born until recently."

As the narrative of the evidence notes, the photographs taken by defendant Urban of the byplay between the grandmother and infant in the nude were intercepted by the processor of the film and referred to the local law enforcement officials. Detective Stoltz of the Columbia Police Department determined from her view of the depictions that there was probable cause to believe that the crime of child abuse had been committed. The defendant Urban and the grandmother, his wife, were taken into custody, and the mother of the infant, T.G., was informed. Stoltz notified the mother that the infant had been sexually abused, and that the grandmother [her mother] and the step-grandfather were in custody. The mother and father of the infant came to the police station where they were shown the photographs taken by the defendant. From other intimations by Detective Stoltz, the mother assumed that the child had suffered physical sexual abuse — even rape, and for that reason was "very upset." She learned, however, that there was nothing else — "[the] pictures were the entire crime." The mother expressed to the prosecutors that "[she] didn't see anything wrong with the pictures," and asked that the Urbans not be prosecuted. The only concern the photographs caused here, the mother of the child explained, was the embarrassment to her mother [the grandmother] of "pictures of [the] family being paraded through a police station."

Detective Stoltz understood the requirement of the law that a police officer with probable cause to believe that a child has been subjected to abuse shall immediately report the abuse to the Division of Family Services. § 210.115, RSMo 1986; *See* also State v. Brydon, 626 S.W.2d 443, 449[6-12] (Mo. App. 1981). That report was not made until four days after Stoltz had viewed the photographs and determined that they constituted sexual child abuse. There was no evidence, however, that the report prompted any active involvement by the Division of Family Services. There was no medical or expert evidence by the prosecution of physical, emotional or other harm to the infant from the episodes depicted in the photographs. The stipulated evidence was that the child was examined by the family pediatrician, Dr. Richard Gengelbach, who had attended him from birth. The child was taken to a doctor for a checkup a few days before the photographic incident and then in June, about a month thereafter, and regularly since. He was trained to detect sexual child abuse, and none was palpable. The mother also took the child for examination to Dr. Ann Duncan, clinical psychologist with special qualifications in the field of child sexual abuse. She evaluated the child and the parents on two separate occasions, consulted with the pediatrician and babysitter, and concluded that there was no evidence the child was abused "sexually, physically, or emotionally." Nor have the parents detected any change in the behavior of the child since the photographing episode.

The prosecution and conviction of defendant Urban were under abuse of a child section 568.060. The enactment is singular as a response to the exploitation of children by sexual performances. It does not aim only against depictions of intercourse, fellatio and other such sexual activity — as does the archetype statute in New York v. Ferber, 458 U.S. 747 (1982), or some variant — but also against the mere depiction of child nudity. The sanction of that component of the statute fails on a person who knowingly photographs the nudity of a child "for the purpose of sexual stimulation or gratification of any person who may view such depictions." The numerous decisions that

construe the *Ferber* variants,[3] therefore, do not bear significantly on the inquiry whether there was sufficient evidence against Urban to justify a rational trier of facts to find guilt beyond a reasonable doubt under our statute. Jackson v. Virginia, 443 U.S. at 313. It is to *Helgoth*, then, that we turn for that assessment.

Helgoth defines the gist of the offense under § 568.060 to be that the defendant acts with the specific purpose to use the depictions of the photographs for sexual stimulation or gratification. 691 S.W.2d at 283. The state of mind it poses is the subjective intent of the photographer. *Id.* The purpose of the depictions — and hence the state of mind — may be established not only by the content but also by the circumstances of the photographic event itself. State v. Chevlin, 284 S.W.2d 563, 566[3-5] (Mo. 1955); State v. Cason, 596 S.W.2d 436 440 (Mo. 1980), *cert. denied*, 449 U.S. 982 (1980). The circumstances that relate to prove a guilty mind include [*Helgoth* at 285]:

> whether the act of depiction is accomplished through the use of threats, force or other coercion; whether it is achieved surreptitiously or by means of a ruse; and, whether the use contemplated for the depiction is dissemination [either commercial or not] or "collection."

In *Helgoth* the photographs of the bare breasts and exposed vagina of a maturely formed girl were taken by an acquaintance in her bedroom and outdoors without the knowledge of her parents. This covert means to the end, as well as the very content of the depictions, sufficed to prove the lascivious subjective intent of the photographer, and hence the *scienter* for conviction under § 568.060. *See also* State v. Vandeventer, 746 S.W.2d 658 (Mo. App. 1988).

Urban, on the other hand, acted openly and without deceit and with the full approbation of the parents of the child. It is the import of the stipulated evidence that the occasion for the photographs was the

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[3] *See, e.g.*, United States v. Smith, 795 F.2d 841 (9th Cir. 1986); Griffin V. Florida, 396 So.2d 152 (Fla. 1981); People v. Hebel, 174 Ill. App.3d 1, 527 N.E.2d 1367 (1988); State v. Burke, 408 N.W.2d 239 (Neb. 1987); State v. Meadows, 28 Ohio St. 3d 43, 503 N.E.2d 697 (Ohio 1986).

impulse of the grandfather to record the domestic scene he came upon of his wife and her grandchild in the nude at play. It was a scene not much different from others he had photographed since the birth of the child. It was a scene, moreover, familiar to the child and acted out by him many times before with his own parents. The photographs the grandfather had taken of the child and of the family on earlier occasions were studio photographs taken and developed in the facility in the basement of the Urban home, as well as snapshots. The snapshots of the grandmother and child in the nude at play were not developed by Urban, although the means were there, but sent to a commercial developer. This and the other incidents of the occasion are circumstances that signify that Urban acted with the guile of a guilty mind. There are no extraneous circumstances for any inference other than the snapshots were taken as family photographs.

The photographs are not all decorous. To a common observer, some of them may lack taste; others may appear crude. The scene of the child reaching for the ball within the pubic area of the grandmother who sits smiling and recumbent, legs apart, may even seem obscene. Criminality under § 568.060, however, does not depend upon the breach of community notions of taste and obscenity, but on the *subjective intent* of the photographer to depict for the purpose of sexual gratification or stimulation. That is to say, it requires proof of intent to use the nudity of the child for that lascivious purpose. *Helgoth* at 285. The depictions, however, show a child innocently as play — as would be expected of a fifteen month old. There is no suggestion of lascivious sexuality from his nudity alone.

The lascivious intent of the photographer, of course, may be shown by circumstances beyond the nudity of the child itself. The snapshots include the nude grandmother. The statute constitutes photographs taken of a nude child for the purpose of the sexual gratification of the viewer as a *prohibited sexual act* whether taken "with any other person or alone." § 568.060.2. The grandmother at play with the child in the nude preparatory to the bath was not planned as an occasion for photography. The evidence does not allow any other inference. The depictions themselves were the spontaneous response of a husband-

grandfather-photographer to [for that family] a normal domestic scene. There is no inference from the evidence that it ever became anything else. The nude woman was the wife of the photographer. There is no basis to suppose that whatever sexual gratification normally passed between the grandmother and the photographer — her husband — was inspired or enhanced through the accessory of a child.

There was no substantial evidence that Urban took the photographs to create depictions for sexual stimulation or gratification. Accordingly, the conviction under § 568.060 does not rest upon proof beyond a reasonable doubt of every fact essential to the crime, and so violates due process of law and constitutes plain error. Jackson v. Virginia, 443 U.S. at 326; State v. Hurd, 657 S.W.2d at 338[1,2].

Our conclusion rests on the occasion of an appellate review of evidence in a criminal case that is neither in contradiction nor subject to the rule of deference owed the trier of fact on decisions of credibility. The prosecution acknowledged in oral argument that the photographs were "95% of the case" and insisted that the depictions themselves sufficed to submit the issue of the intent to photograph for the purpose of sexual stimulation or gratification — and hence of guilt of the offense — to the factfinder.

In our jurisdiction, a photograph is admissible in a criminal case if it " '*corroborates the testimony of a witness*, connects the accused with the offense, provides the identity of the victim, or tends to prove any material elements in the case.' " State v. Davis, 653 S.W.2d 167, 175[16,17] (Mo. Banc 1983) (quoting State v. Daugherty, 631 S.W.2d 637, 641 (Mo. 1982) [emphasis added]. *See* cases cited 42 Missouri Digest 2d, *Witnesses* Key No. 414(1).

That is to say, in Missouri, it is the general rule that photographs as evidence are demonstrative and do not speak for themselves or tell their own story. They corroborate the story of a witness. State v. Floyd, 360 S.W.2d 630, 632[1-3] (Mo. 1962); S.A. Gard, Missouri Evidence § 15:30 (1985). Wigmore describes the evidential quality of photographs under this rule with poignancy:

> We are to remember, then, that a . . . [photograph] is, for evidential purposes, simply *nothing, except so far as it has a human being's credit to support it.* It is mere waste paper — testimonial nonentity . . . It can of itself tell us no more as to the existence of the thing portrayed upon it that can a tree or ox. We must somehow put a testimonial human being behind it (as it were) before it can be treated as having any testimonial standing in court. It is *somebody's testimony*, or it is nothing. . . . [W]henever such a document is offered as proving *a thing to be as therein represented*, then it is offered testimonially, and it *must be associated with a testifier*. [emphasis original].

3 Wigmore, Evidence § 790, p. 218 (Chadbourn rev. 1970). When received on a material element of the offense, the role of a photograph under our law is to corroborate or aid the understanding of other "verbal" testimony already received. State v. Jackson, 499 S.W.2d 467, 472[5-8] (Mo. 1973); State v. Nash, 648 S.W.2d 911, 913[3] (Mo. App. 1983). *See* cases cited 12 Missouri Digest 2d, *Criminal Law* Key No. 438(1).

The photographs were received in evidence under a stipulation. It was tantamount to a validation of the chain of custody from the K-Mart store where they were left for processing to their retrieval by the grandmother Urban to the ultimate possession of the Columbia police. It was also a stipulation that nothing indicated the photographs were intentionally altered, retouched or otherwise damaged. It identifies the persons in the depictions as the grandmother and grandchild, her relationship to the photographer, that the photographer was the defendant Urban, and identified the site and date of the event. There was no testimony as to what the several scenes were meant to represent or what they intended. Thus, they served no function to corroborate or illustrate verbal testimony on any element of the case.

The oral argument of the prosecutor urges us, in effect, to treat the photographs as independent substantive evidence, probative itself, on the element of intent to photograph the nudity of the child for the purpose of sexual gratification or stimulation. This *silent witness* theory of admission draws its verification, not from a witness who has

viewed the scene depicted, but from the reliability of the process by which the representation was produced. "[The photograph] . . . [is] admitted into evidence not merely as illustrated testimony of a human witness but as probative evidence in itself of what it shows." People v. Bowley, 31 Cal. Rptr. 471, 475[8], 382 P.2d 591 (1963). The photograph speaks for itself. This method of proof has been employed in cases of Regiscope photographs[4], bank robbery photographs and sexual offenses such as sodomy. That is to say, the photograph has been allowed to speak for itself when the depiction, in itself, proves the crime it purports to show. Bergner v. State, 397 N.E.2d 1012, 1019 (Ind. App. 1979); State v. Pulphus, 465 A.2d 153, 161 (R.I. 1983); Ferguson v. Commonwealth, 212 Va. 745, 187 S.E.2d 189, 190 (1972), *cert. denied*, 409 U.S. 861 (1972).

The prosecution does not say how the *silent witness* theory of admissibility of photographs may be accommodated to our precedents. Nor need we consider the question. The offense charged against Urban was that he knowingly photographed the nudity of the child for the purpose of sexual gratification or stimulation of any individual who may view the depiction. The photographs under that component of § 568.060 are the foundation of the crime. They are part of the *corpus delicti* and are admissible on that basis, quite apart from any theory of *silent witness*. They bear as independent substantive evidence to prove that a crime was committed under § 568.060. State v. Withers, 347 S.W.2d 146, 149[5] (Mo. 1961); State v. Friesen, 725 S.W.2d 638, 639[1-5] (Mo. App. 1987).[5] *See also* and compare § 573.050, RSMo 1986.

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[4] A Regiscope is simply an automatic camera which takes a simultaneous picture of a check being offered for cashing and of the person presenting it. Regiscope photographs are often admitted as substantive evidence in forgery prosecutions despite the inability of the clerk who cashed the check to remember the particular transaction or individual." Bergner v. State, 397 N.E.2d 1012, 1015 (Ind. App. 1979).

[5] The function of the photographs of nudity as substantive evidence of the offense under § 568.060 was not in issue in State v. Helgoth, 691 S.W.2d 281 (Mo. banc 1985). The sufficiency of the evidence to sustain the conviction was not in issue. *Id.* at 283 n.3

The admissibility of the photographs as substantive evidence assumed, therefore, the question remains whether they were sufficiently probative of the offense so that a rational trier of fact could find the defendant guilty of the offense charged beyond a reasonable doubt. There is no dispute that Urban knowingly took the photographs, nor that the depictions before the court were faithful to the negatives. That is to say, the issue for the trier of fact was whether the nudity was depicted for the sexual stimulation or gratification of a viewer. The basis for the admission of photographs that are part of the *corpus delicti* as substantive evidence is that they are self-authenticating as to the scene and action depicted. State v. Withers, 347 S.W.2d at 149.

The nudity of the child and grandmother, the scenes of the child kissing the breasts of the grandmother, eating a small marshmallow from her nipple, reaching for a ball within her pubic area, and the gestures and expressions of the grandmother are all evident from the photographs. The intent of the photographer to sexually stimulate or gratify the viewer, however, is not a scene or action depicted but must be inferred, if at all, from the pictorial content or the circumstances of the event. The prosecution argues that the very content of the photographs allows a probative inference of the lascivious intent the statute imposes as an element of offense and conviction. The argument is that the obvious relish of the grandmother and the photographs register in the byplay with the grandchild suffices to prove the lascivious intent of the photographer, and hence to sustain the conviction. That obvious lascivious relish — the argument must also mean — was incited by the nudity of the child and so suffices to prove the lascivious intent of the photographer the statute requires for conviction. The smiles and gestures of the grandmother, however, are ambiguous and open to the evaluation of the viewer. The smiles and gestures are as consistent with the delight a grandmother takes in the intimacy of a grandchild at bathtime as with a lascivious response to the intimacy. Where two equally valid inferences can be drawn from the same evidence, one probative of guilt and the other not, the evidence does not establish guilt beyond a reasonable doubt. State v. Prier, 634 S.W.2d at 200[3-5]; State v. Black, 611 S.W.2d 236, 240 (Mo. App. 1980); State v. Gardner, 737 S.W.2d 519, 521[3] (Mo. App. 1987).

Accordingly, in the absence of other circumstances probative of criminal intent, the photographs were not sufficiently probative to submit the issue of Urban's guilt.

The prosecutor argues that there were other circumstances shown in the evidence that are probative of the unlawful intent of the photographer. He cites excerpts from the transcript testimony of the mother, and another from the statement by the grandmother to the police.

The prosecutor asserts that when the mother picked up the child "appellant [photographer Urban] made no mention of the pictures to her." The prosecutor finds from this the logical inference that he did not tell the mother "because he knew the pictures were for an illegal purpose and that the mother would disapprove. Moreover, the fact that [Urban] had never before taken such pictures, even though he was a photographer, undercuts [Urban's] claim that he simply wanted to capture his wife and grandson partaking in 'childplay'."

The integrity of this argument depends upon assumptions the evidence does not permit. There is simply no source in the record for the premise of the argument that when the mother picked up the child, Urban was at home, so that his neglect to mention the pictures to her was [presumably] a guilty concealment. The evidence was that the *grandmother* [the mother of the witness] was at home at the time, but did not mention the photographs. The mother explained:

> Q. Now, when you picked up [the child] from your mother's home, did your mother tell you whether or not she had taken photographs of the child?
>
> A. They took photographs of him all the time. There was no need to tell me. They always showed me the pictures.

There is no evidence that the photographer Urban was even at home when the mother came to retrieve the child. There was no need for the grandmother or step-grandfather to tell the mother of such a photographic event, nor did the mother expect to be told, because she was always shown the pictures. The photographs, of course, were never displayed to the mother by either the photographer or the grandmother

simply because they were intercepted by the police at the time the grandmother came for them at the K-Mart.

The other premise of the argument, that Urban "had never before taken such pictures" is at odds with the transcript testimony of the mother — the only evidence on the subject. The nudity of the child was the subject of photographs by step-grandfather Urban virtually from the day of birth. Some were taken by the grandmother also.

> Q. Do some of these pictures depict [the child] in the state of nude while bathing and other family such type photos?
>
> A. Yeah, they do. From the night he was born until recently.

The prosecutor alludes to yet another excerpt from the testimony of the mother for the inference that the photographer acted with lascivious intent. It related to her conduct after she was summoned to the police station. She was informed by the police "that the mother and David [photographer Urban] were in custody and that they had evidence that they had sexually abused [the child]." That raised fears in the mother that the child had been raped and sexually harmed. When she arrived the police displayed the photographs to her, and she threw them down on the table. The prosecutor argues that the reaction and conduct of the mother on that occasion "buttress the state's theory" of guilty intent of the photographer.

It was the testimony of the mother, however that thereafter she came to understand that there was no physical abuse, and came to realize that these pictures were the crime — "that's all there was." She then told the prosecutor as well as the social worker that she "didn't see anything wrong with the pictures." She had been angry and upset about the photographs when they were first displayed to her, she explained, "because [she] believed at that time that there had been sexual abuse." What remained was embarrassment for her mother because the family pictures "were never meant to be on public display," yet they were "being paraded through a police station."

Rather than a "buttress [to] to the state's theory" of guilt, the testimony the prosecution recounts proves only that to the mother —

as an observer of the contents of the depictions — there was no suggestion of lasciviousness or even of impropriety. None of the transcript incidents the prosecution cites are circumstances probative of the content of the photographs or of the lascivious intent of the photographer the statute requires for conviction of the offense beyond a reasonable doubt.

It may be that the prosecutor, for the inference of guilty intent, means to allude to the excerpt from the statement by the grandmother to the police that the photographic event was "the only time David [the defendant] has taken photographs of me and [the child] without any clothes on together." The inference the prosecutor would derive, as we note, it that the fact Urban had never before taken such pictures "undercuts [his] claim that he simply wanted to capture his wife and grandson partaking in 'childplay'." The nudity of the child — as the uncontradicted evidence already explains — was a subject of photography by the defendant from the day the child was born. The statement of the grandmother to the police elaborated that, although that was the only time the defendant photographed her and the child together in the nude, she attended the child at bath in the nude before and always removed her clothes because he "splashes a lot" and that was the only way "to keep from getting drowned." The "logical inference" of lascivious intent the prosecutor would derive from these multiple excerpts implicitly assumes that the nudity of the grandmother and child was not the usual concomitant of the bath, but that the occasion was contrived for the purposes of the photographs. The testimonial excerpts the prosecution cites allow no substantial ground for such a "logical inference." The evidence was *only* that the nudity of the child was a recurrent subject of photography by the defendant, that those occasions were with the expectation and approval of the parents, that the nude bathing episodes were also the usual mode, and that the photographic event itself was fortuitous and spontaneous. Those inferences are not inevitable, but the evidence will not support any other.

The scenes and action that the photographs depict allow equally valid inferences, one probative of guilty intent and the other probative of innocent intent, and so do not establish guilt beyond a reasonable

doubt. The other evidence, altogether consistent and uncontradicted, does not aid to dispel that ambiguity. Accordingly, the conviction under § 568.060 does not rest upon proof beyond a reasonable doubt of every fact essential to the crime and may not stand. Jackson v. Virginia, 443 U.S. at 326.

That is not to say, nevertheless, that the photographic episode may not have subjected the child to the possibility of those emotional and mental consequences that § 568.060 and others of that genre were enacted to prevent. If so, however, under this evidence that possibility of harm was not the consequence of any criminal behavior of the photographer, but of the domestic practices of the parents. The corrective was not the criminal law but the special function of statutes repose in the Division of Family Services in such circumstances. § 210.115; *see also* State v. Brydon, 626 S.W.2d at 449[6-12].[6]

The judgment is reversed.

Charles Shangler, Judge

Nugent, C.J., P.J., Concurs and concurs in the concurring opinions of Berrey and Ulrich;

Turnage, J., Dissents in a separate dissenting opinion filed and concurs in the other dissenting opinions;

Clark, J., Dissents in a separate dissenting opinion filed and concurs in the dissents of Fenner, Lowenstein, Turnage and Manford;

Manford, J., Dissents in a separate dissenting opinion filed and concurs in the dissents of Turnage, Clark, Lowenstein and Fenner;

Kennedy, J., Concurs and concurs in the concurring opinions of Berrey and Ulrich;

[6] As our discussion notes, in this case, the report of the activity the police suspected as child abuse was not given that urgent referral to the agency the statute contemplates, and — from all that appears — the report resulted in no active involvement by the Division of Family Services.

Lowenstein, J., Dissents in a separate dissenting opinion filed and concurs in the other dissenting opinions.

Berrey, J., Concurs in a separate concurring opinion filed and concurs in the concurring opinion of Ulrich;

Gaitan, J., concurs and concurs in the concurring opinion of Ulrich;

Fenner, J., Dissents in a separate dissenting opinion filed;

Ulrich, J., Concurs in a separate concurring opinion filed.

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 40852

STATE OF MISSOURI,
Respondent,

-vs-

DAVID L. URBAN,
Appellant.

Opinion filed:
November 14, 1989

DISSENTING OPINION

I dissent and join in the other dissenting opinions. In addition, I wish to state some additional grounds.

Although the majority correctly states the duty of this court is to accept as true all evidence that tends to prove guilt, together with all reasonable inferences favorable to the prosecutor, and disregard all unfavorable inferences, the majority promptly ignores this duty.

The violation by the majority of this rule of review is easily illustrated by reference to the discussion of the facts surrounding the taking of the pictures. The majority states that David returned and found Patsy and the boy playing on the floor and that the pictures were a spontaneous response of David to a normal domestic scene. It further states the scene depicts Patsy and the boy getting ready to take a bath and that David had photographed the child in the nude since his birth. The majority also makes reference to the evidence of the lack of sexual abuse found by the physician and psychologist. All of this evidence is contrary to the judgment and should have been disregarded by the majority.

I agree that the evidence of guilt must be found from the photographs together with the statement by the grandmother at the time of her arrest. The majority rests its decision on the finding that the

photographs lead to two equally valid inferences — one supporting guilt and the other innocence. An inference of innocence can only be drawn if David's evidence, as recounted above, is taken as true. The pictures viewed, as they must be, in the light most favorable to the judgment, can only support an inference that they were taken to provide sexual gratification. Only by ignoring the limits of appellate review can the majority reach its conclusion. I could not, in my wildest imagination, characterize these pictures as simply "a child innocently at play" with his grandmother. Even though the child is innocent, I cannot say the same for the grandmother or David.

The majority, in addition to relying on the defendant's evidence and inferences drawn therefrom, sets up a false argument drawn from *State v. Helgoth*, 691 S.W.2d 281 (Mo. banc 1985). The majority states that since the photographs in *Helgoth* were taken covertly, such conduct is evidence of intent. The fact that the photos in *Helgoth* may have been taken covertly does not mean that is the only source of proof of intent. The majority states that the pictures here were taken in the presence of David's family, and since they were not taken covertly, there is no evidence of intent that they were taken for sexual gratification. The fact that the pictures were taken by a member of the child's family makes this case all the more egregious because a child can, to a large degree, be protected from strangers, or non-family members, but has no protection from his own family. Thus, the fact that the pictures were taken openly, as contrasted to covertly, has no bearing on intent which the pictures clearly reveal to me.

The majority further places reliance on the fact that the pictures were taken to K-Mart to be developed, as some evidence of an innocent state of mind. First, this is an inference contrary to the judgment and should be disregarded. More importantly, the fact that the photographs were taken to K-Mart only indicates a mistake of judgment. Most persons convicted of crimes have made mistakes in judgment which led to their apprehension. If this is a ground of acquittal, the majority has indeed laid the foundation for the acquittal of a large majority of criminal cases which come before this court. Taking the photographs, and the inference which can be drawn from them favorable to the judgment, I can only conclude that they were staged photographs

which would later be used for sexual gratification. It is tragic that small children are abused by adults in order to obtain sexual gratification. Obviously, it was the intent of the legislative, in passing the statute involved, to protect children from such abuse.

How the majority can conclude that the photographs do not prove the crime, but may have subjected the child to the emotional and mental consequence that the statute was enacted to prevent, is beyond my comprehension. This conclusion by the majority is totally inconsistent with the them the majority has used in reversing the conviction. If the majority really feels that these pictures only depict the innocent and gleeful interaction between a grandmother and a grandson, a pastoral scene of domestic play prior to a bath, there could hardly be any danger of emotional or mental harm to the child. This contradiction by the majority reveals the object of the opinion to be only a quest for an acquittal.

The pictures, and the reasonable inference to be drawn therefrom, constitute substantial evidence which satisfies the constitutional requirement for the finding of guilt. I would affirm the judgment.

/s/ WILLIAM E. TURNAGE, Judge

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 40852

STATE OF MISSOURI,
Respondent,

-vs-

DAVID L. URBAN,
Appellant.

OPINION FILED:
NOVEMBER 14, 1989

DISSENTING OPINION

I join the dissenting opinions of Fenner, Lowenstein, Turnage and Manford and also write to express my opinion on the process by which the majority reached the issue leading to reversal of the conviction and, consequently, the discharge of the defendant.

The majority acknowledge that appellant has only contended on appeal that § 568.060, RSMo 1986, under which appellant was charged, does not suffice to state an offense because of vagueness and that no offense results in any event because the naked child in the photographs had not attained puberty. If that were the issue to be decided, as the usual and normal practice on appeal observes, an abbreviated opinion citing *State v. Helgoth*, 691 S.W.2d 281 (Mo. banc 1985), would suffice to affirm the conviction. Instead, the majority have elected to delve into the issue of the sufficiency of the evidence to establish intent of appellant as disclosed by the only competent evidence on the subject, the photographs of the nude child and its nude grandmother, appellant's wife. To release the appellant from the conviction, the majority effectively usurp the function of the trier of fact and substitute their judgment that the photographs do not offend against the statute.

The content of the majority opinion graphically reveals a disposition against conviction of appellant. Despite a recitation of the rule of

deference to the fact of the conviction and the requisite acceptance of all evidence and inferences favorable to the state, the majority opinion is replete with statements of fact slanted toward the benefit of appellant and inferences, even in describing the photographs themselves, tending to place appellant and the grandmother in the most benign light possible.

The majority opinion expressly recognizes that the issue of sufficiency of the evidence was never presented to the trial court and was not included in the statement of points on appeal. Even after this court had directed counsel, in an order for rebriefing after transfer to the court en banc, to address the question, counsel returned to the same argument presented earlier that the offense did not lie where the juvenile shown in the photographs was of a pre-pubertal age. The issue on which the majority opinion grounds its reversal is therefore unpreserved and taken up sua sponte as plain error.

A vital component of plain error review authorized under Rule 30.20 is a determination that a manifest injustice or a miscarriage of justice has resulted. Absent a showing of manifest injustice or a miscarriage of justice, unpreserved error does not warrant reversal of a criminal conviction. *State v. Cunningham*, 763 S.W.2d 186, 190 (Mo. App. 1988). Even assuming the propriety of sua sponte plain error review, the majority opinion does not say that the conviction in this case represents a manifest injustice or a miscarriage of justice, nor could it.

The only authority cited by the majority to support their undertaking to redetermine the result in this case without benefit of claimed error by appellant is *State v. Hurd*, 657 S.W.2d 337 (Mo. App. 1983). In *Hurd*, the defendant was convicted of disposing of stolen property. The court apparently was preliminarily concerned with the fact that the defendant had never been in actual possession of the stolen goods, but had acted as an intermediary to negotiate their sale to an undercover officer. The issue of sufficiency considered was whether the proof showed the defendant to have had knowledge that the goods were stolen. The court concluded that circumstantial evidence served to prove this element of culpability, given the deference to the inferences

which the state was entitled to enjoy upon conviction. *Hurd* scarcely serves as authority for a wide ranging mandate authorizing the appellate court to consider error sua sponte nor does the opinion discuss error preservation at all. The opinion merely evidences a concern that any possible cause to doubt the validity of the defendant's conviction be laid to rest.

In the present case, as in all similar prosecutions, the pivotal issue is whether the product was conceived by the photographer with intent that the images depicted sexually stimulate any person who viewed them. Obviously, anyone accused under the statute will seek to advance some ostensibly innocent explanation, a ruse the majority opinion has accepted from appellant as an article of faith. In the final analysis, however, it is the photographs themselves which belie protestations of innocence. Even the majority opinion concedes as much. If the evidence accepted by the trier of fact utilizing the subjective standard to evaluate intent supports the conviction, there is no manifest injustice or miscarriage of justice merely because other evidence viewed in the light most favorable to the defendant could lead to a different conclusion.

The majority opinion in this case stands for the proposition that this court is entitled, and perhaps is obligated, to seine the evidence in any criminal conviction, irrespective of whether the appellant asserts a deficiency in proof, and re-evaluate that evidence without deference to the prior verdict to the end that convictions may be reversed for plain error if the evidence is deemed equally probative of guilt or innocence. There is no authority for such appellate review and it should not have been undertaken here.

The conviction should be affirmed.

/s/ DONALD B. CLARK, JUDGE

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 80,482

STATE OF MISSOURI,
Respondent,

vs.

DAVID L. URBAN,
Appellant.

OPINION FILED:
November 14, 1989

DISSENTING OPINION

I must dissent from the majority opinion.

I hereby concur in the dissenting opinions authored by Judges Turnage, Clark, Lowenstein and Fenner for the reasons set forth therein.

In considering this matter, one question kept presenting itself, that being: For what purpose were these photographs taken? The majority opinion attempts to explain this way as being the result of a sudden impulse to record a domestic scene that appellant happened upon. This writer finds that conclusion virtually inconceivable after viewing the photographs. In this writer's opinion, this conclusion must be derived from a twofold basis:

First, the majority assumes that the photographs were coverage of spontaneous events. In this writer's opinion, the photographs reflect staged or prearranged events and positions of those persons depicted.

Second, the majority opinion can only have derived such conclusion from appellant's evidence and by so doing, violates the rule in *State v. Morgan*, 592 S.W.2d 796, 805 (Mo. banc 1980).

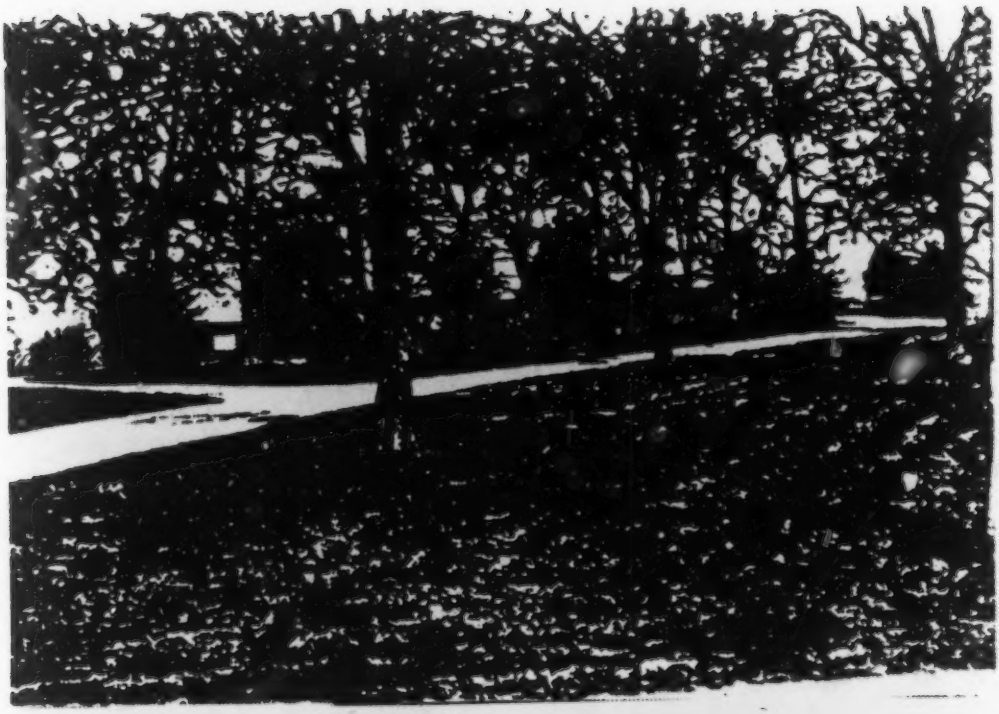
It is to the credit of the majority and those of the dissenting side of this controversy that a sincere, in-depth attempt was made to describe

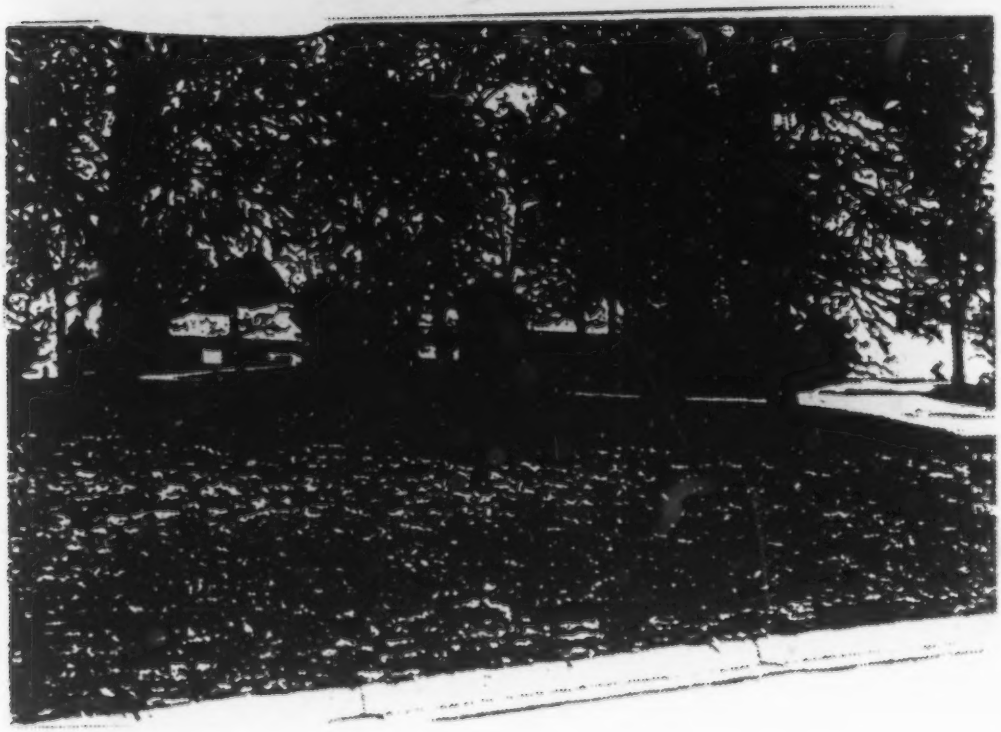
what the photographs depict. The photographs are the best source, and they are hereby affixed to this dissent.

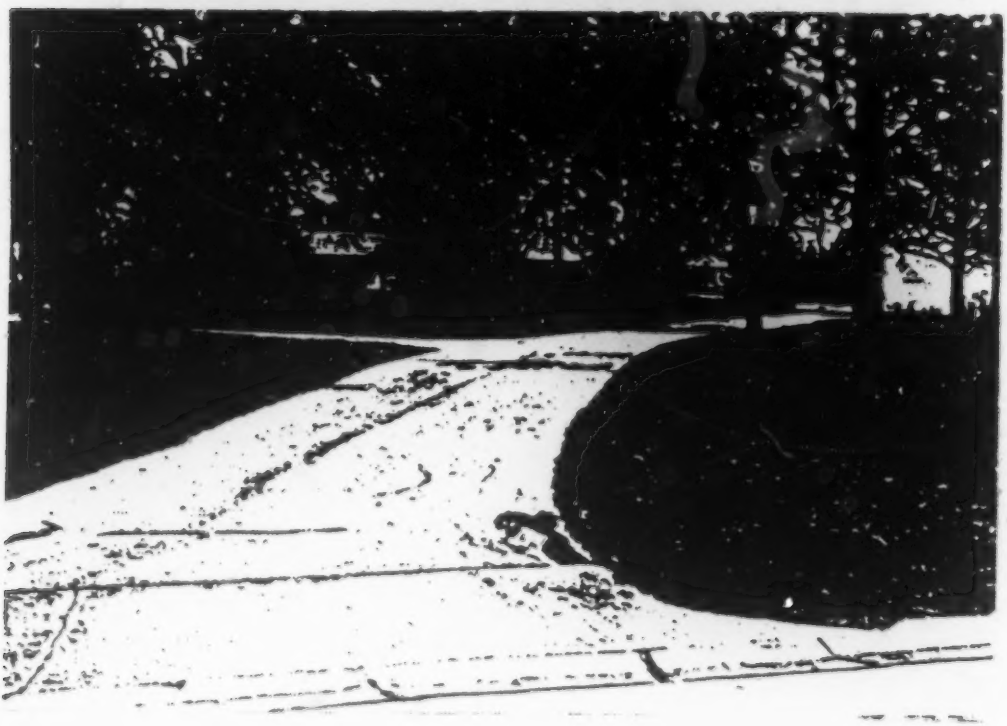
The judgment should be affirmed.

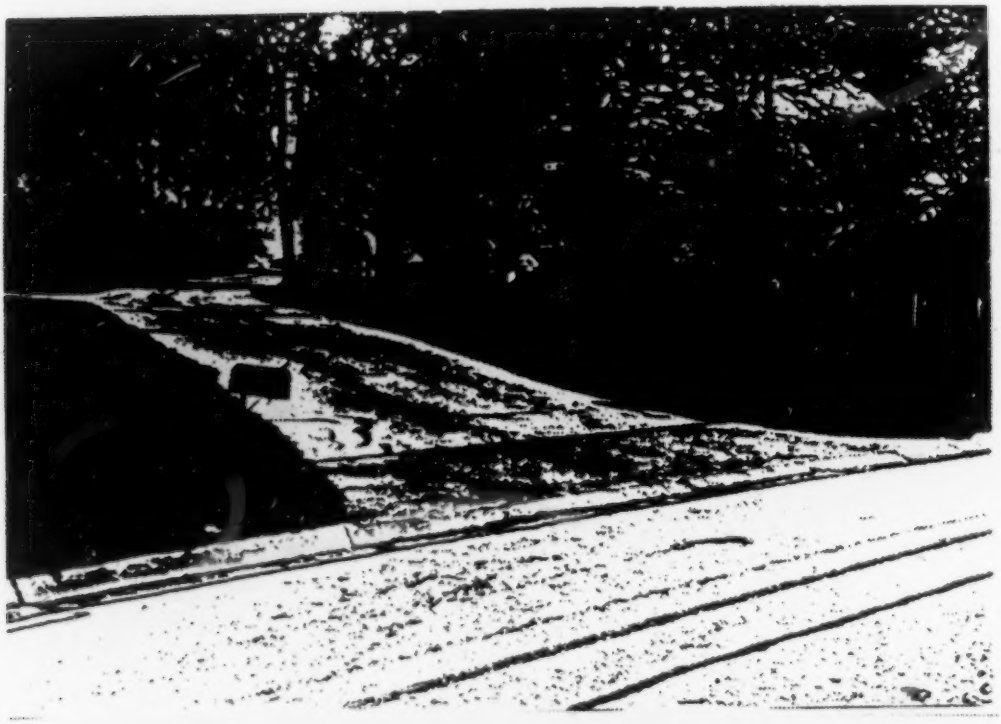
Because I deem the majority opinion to be in conflict with the decisions in *State v. Franco*, 544 S.W.2d 533 (Mo. banc 1977), *cert. denied*, 431 U.S. 957, 97 S. Ct. 2682, 53 L.Ed. 275 (1977); *State v. Morgan*, 592 S.W.2d 796 (Mo. banc 1980); *Sheldon v. Board of Trustees*, ___ S.W.2d ___ (Mo. banc 1989) (Slip Op. #71717, filed November 14, 1989) (When the case was tried on stipulated facts, the only question was whether the trial court drew the proper legal conclusion. Slip op. at 3); and *State v. Dulany*, ___ S.W.2d (Mo. banc 1989) (Slip Op. #70914, filed November 14, 1989) (On review, the court accepts as true all evidence favorable to the state and disregards all evidence to the contrary; review is limited to the determination of whether there is sufficient evidence from which a reasonable juror might have found defendant guilty beyond a reasonable doubt. Slip op. at 6), I hereby certify this cause to the Missouri Supreme Court pursuant to Mo. Const. Article V, § 10 (as amended) and Rule 83.01, V.A.M.R., although this dissent is modified to include this certification subsequent to the issuance of the opinion herein. Said modification is not barred, but is permitted under the rule in *Huber v. Gershman*, 300 S.W.2d 501 (Mo. 1957), appeal transferred, 286 S.W.2d 558 (Mo. App. 1956) and *State v. Miller*, 650 S.W.2d 619 (Mo. banc 1983) since the mandate in this case has not issued.

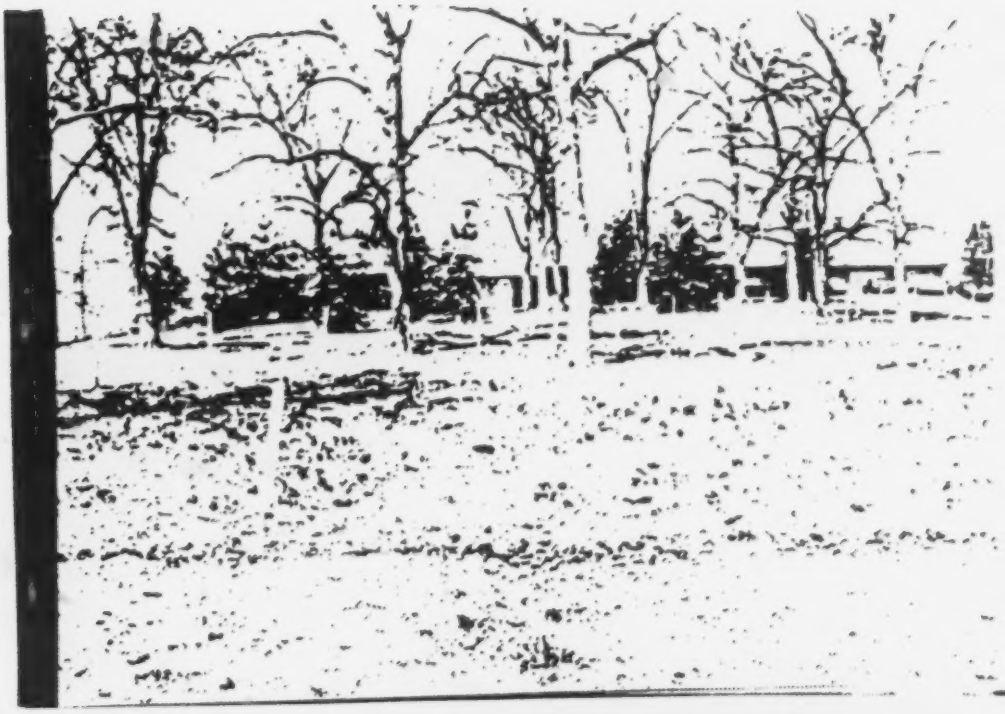
/s/ Donald L. Manford, Judge

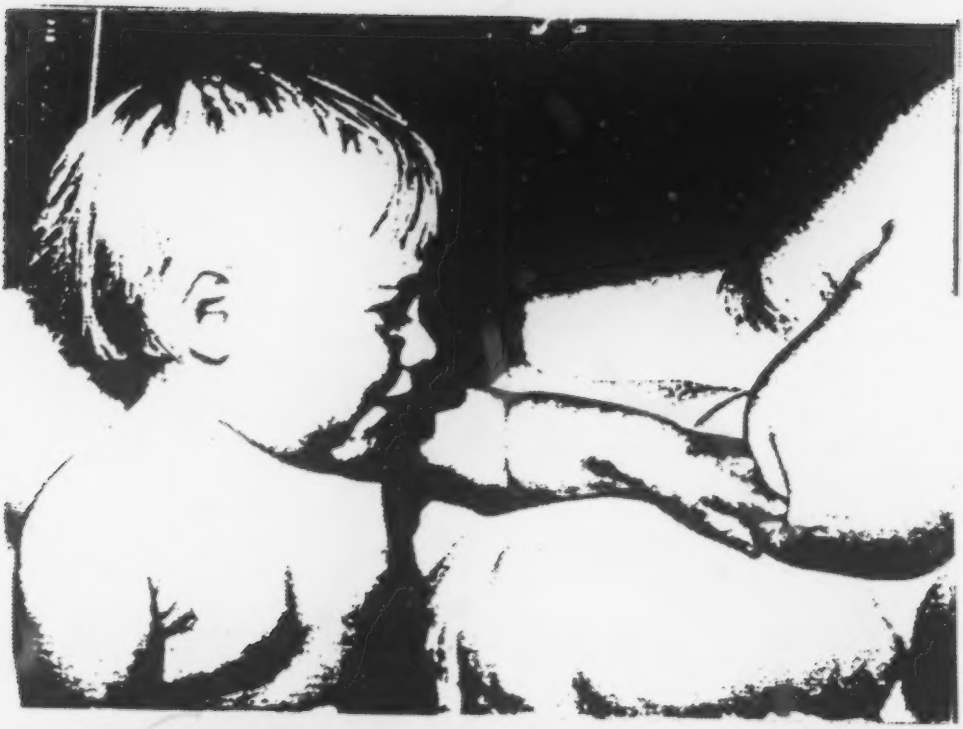


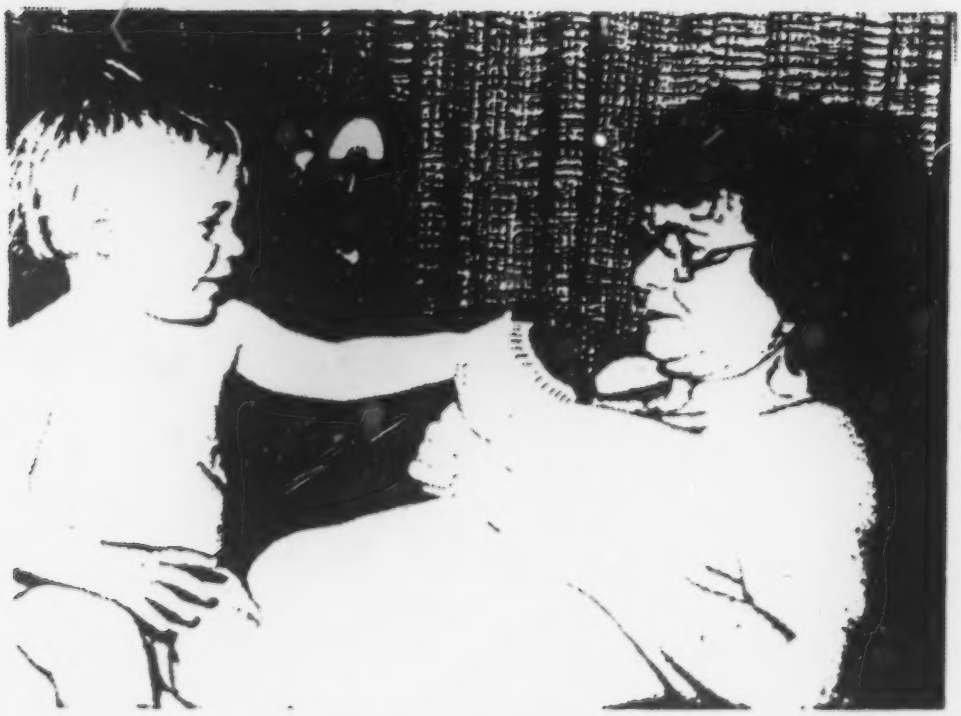


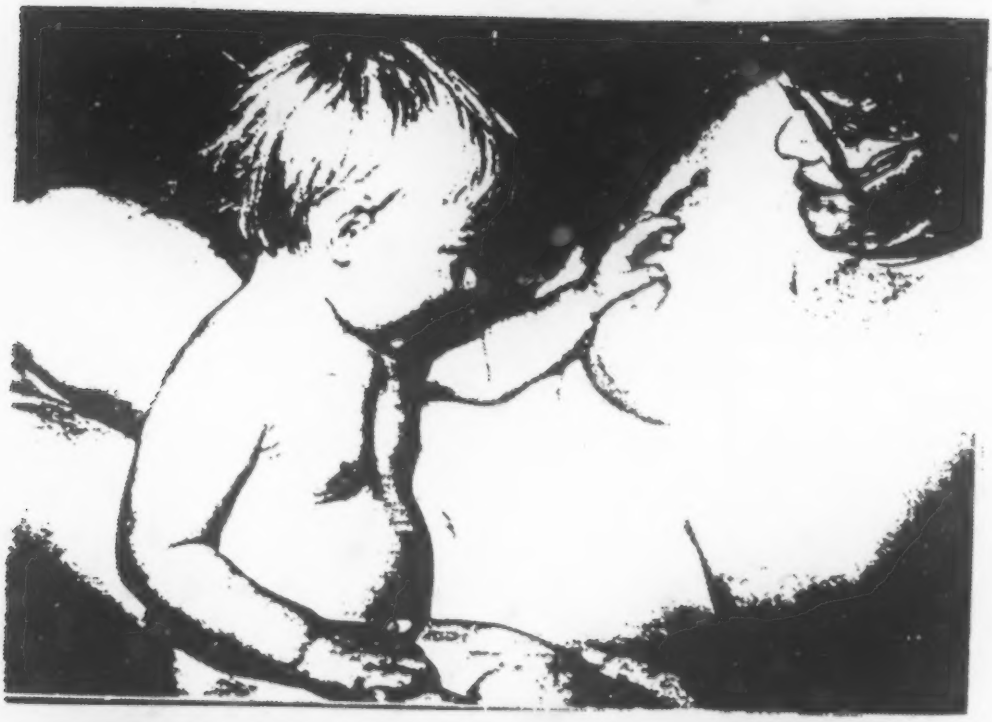


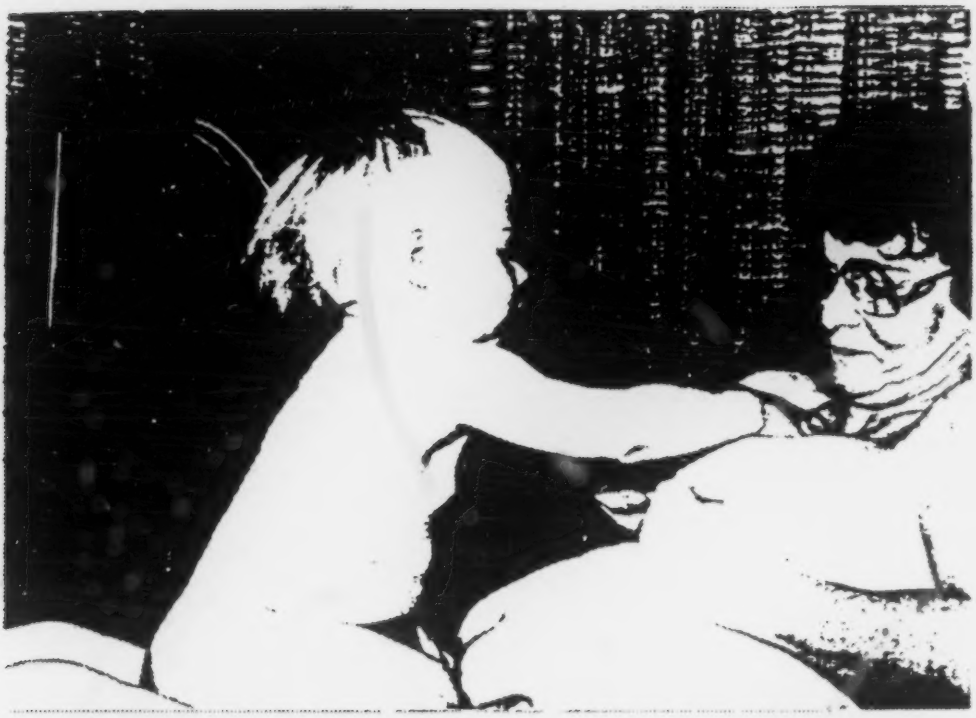


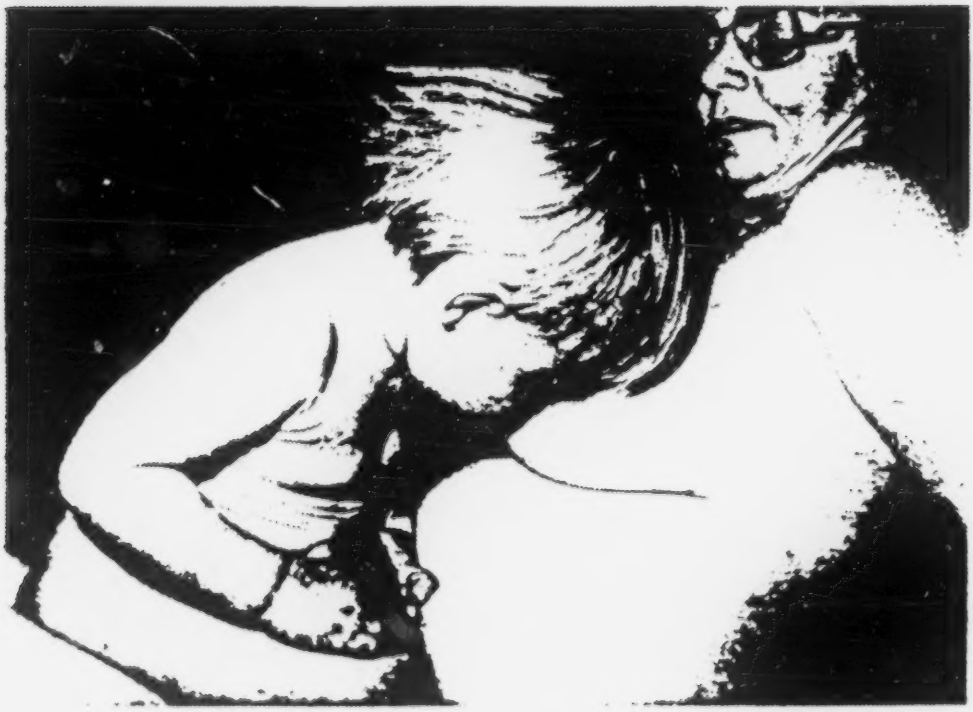


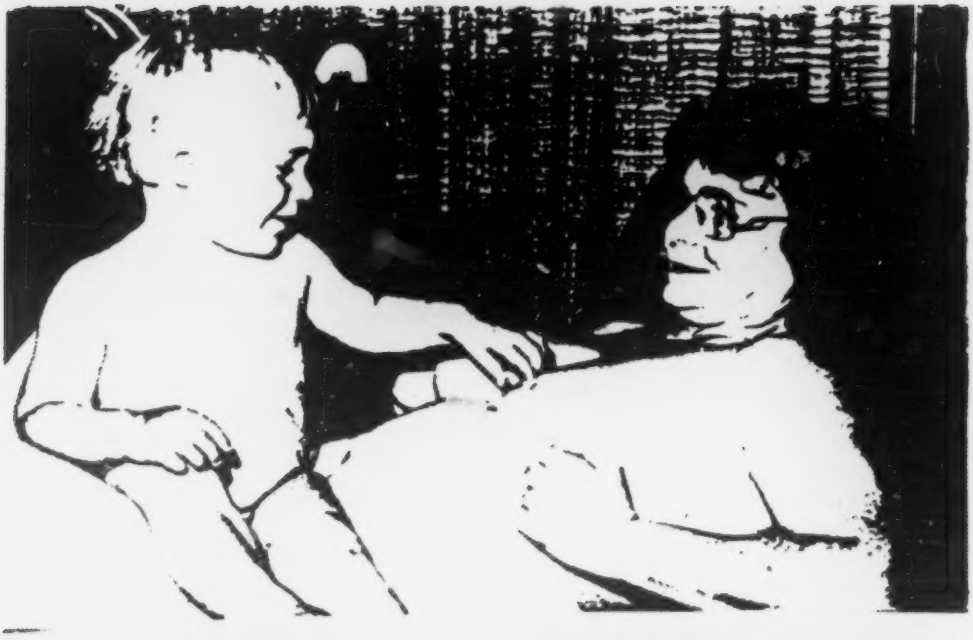


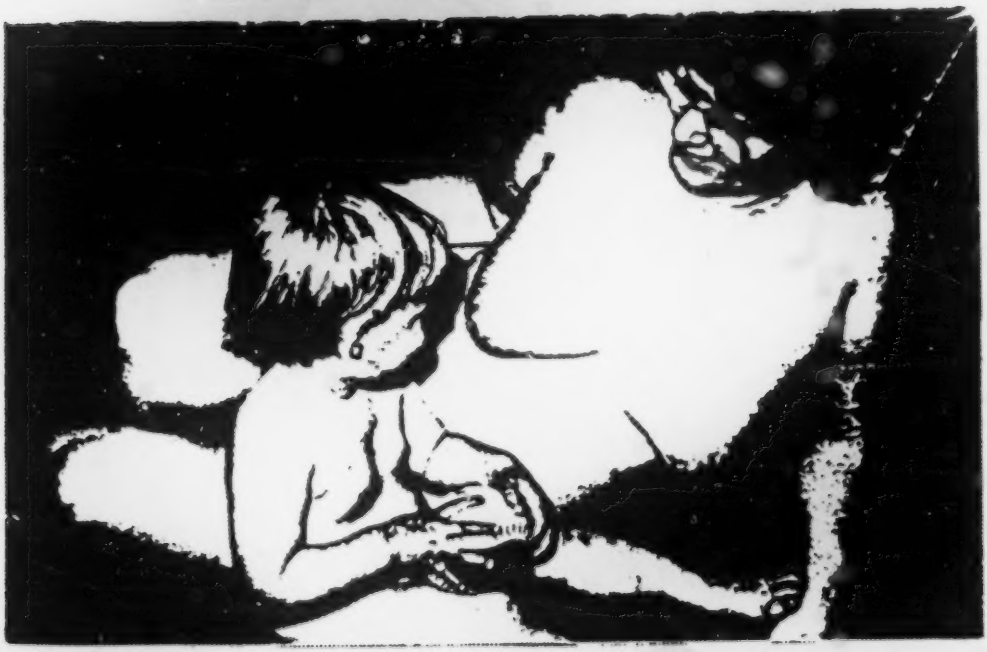


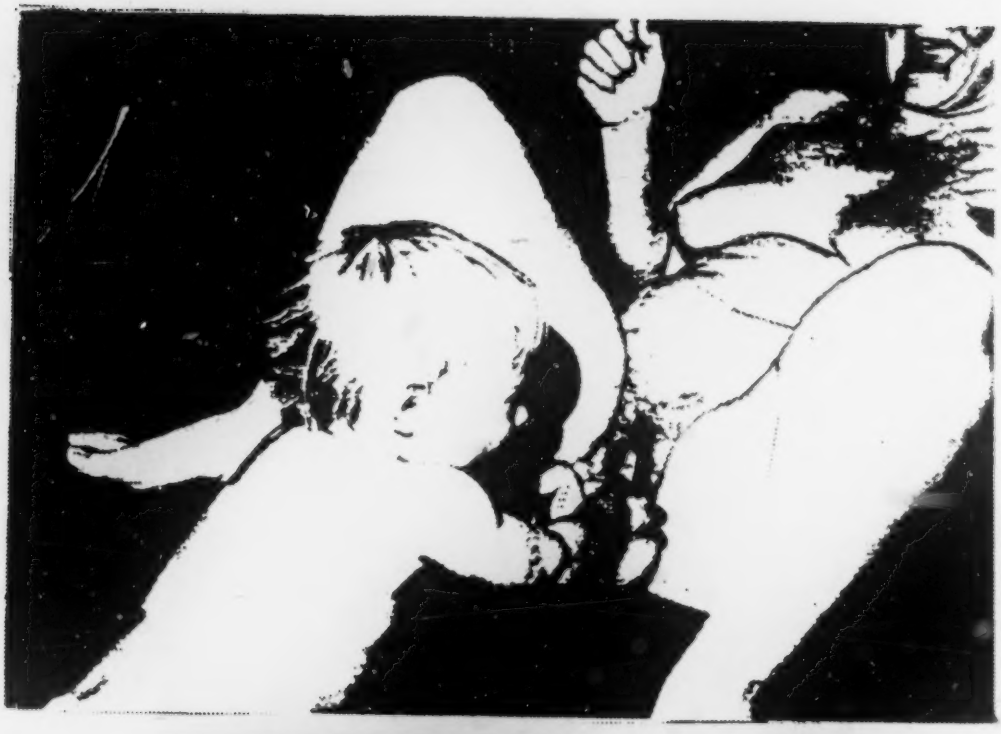












IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 40852

STATE OF MISSOURI,
Respondent,

vs.

DAVID L. URBAN,
Appellant.

OPINION FILED:
NOVEMBER 14, 1989

DISSENTING OPINION

I join in the other dissents, and also file this dissent. The statement in the majority opinion that photographs are merely demonstrative and don't tell their own story is well and good. There is no quarrel with the fact a picture of the crime scene is not self proving or accorded greater weight than the testimony of witnesses. At the very crux of the offense here are the nude photographs of a child under seventeen, § 568.060.1(2). If law enforcement persons intercepted a photo taken by a defendant of a naked one year child picking marshmallows off the heads of mating animals and the defendant didn't present evidence, under the majority opinion, the state could not make a case — the child victim couldn't testify, and there would be no evidence the defendant acted with guile with no direct proof of the defendant's subjective intent. I can't imagine the legislature wanted to curb child abuse in such a way. Neither can I imagine the general assembly devised a system to protect children that would allow an appeals court to second guess the trier of fact when an accused said such pictures were taken with the consent of a parent and were to be used in a family album. As an aside, we would scold a guardian who allowed his or her charge to be photographed in such a manner. Also, that the Division of Family Services failed to be roused by such pictures would touch only on that division of government's capabilities, not the criminality of the defendant's acts. As now interpreted by this case, without an admission by the defendant

of an intent to use the pictures he took for his or someone else's sexual stimulation or gratification, no guilty verdict under § 568.060 could be sustained on appeal. Likewise, if at trial the defendant denied any improper intent the matter of criminal intent would be placed in a position of equipoise to be ruled upon differently by an appeals tribunal. I cannot imagine the legislature intended to allow or condone naked infants to be photographed munching sweets off their naked grandmother's nipples. The judgment should be affirmed.

/s/HAROLD L. LOWENSTEIN, JUDGE

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 40852

STATE OF MISSOURI,
RESPONDENT,
V.
DAVID L. URBAN,
APPELLANT.

OPINION FILED:
NOVEMBER 14, 1989

CONCURRING OPINION

I concur in the principal opinion and the concurrence by Ulrich, J. However, I must register my strong objection to the photographs attached to the dissent of Manford, J., depicting this fifteen month old child and his grandmother at play in the nude.

The Southwestern Reporter is certainly not an appropriate forum for photographs of the child and his grandmother given the potentially unpredictable consequences that publication may have on the child. Few of us would want our more bizarre moments captured in time for all the world to see, regardless of what constitutes those moments. In my opinion the pictures are neither necessary nor appropriate and they should not be incorporated in the dissenting opinion.

/s/ Robert W. Berrey, III — Judge

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 40852

STATE OF MISSOURI,
Respondent,

vs.

DAVID L. URBAN,
Appellant.

OPINION FILED:
November 14, 1989

DISSENTING OPINION

I respectfully dissent from the majority opinion.

As stated in the majority opinion, appellant was convicted of child abuse under § 568.060.[1] In pertinent part § 568.060 provides as follows:

> 1. A person commits the crime of abuse of a child if he:
>
> . . .
>
> (2) Photographs . . . a child less than seventeen years old engaging in a prohibited sexual act . . .
>
> 2. "Prohibited sexual act" means any of the following, whether performed or engaged in either with any other person or alone:
>
> . . . nudity, if such nudity is to be depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction.

There is no dispute in the case at bar but that appellant photographed a child of less than seventeen years' old engaged in nudity. The

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[1] All statutory references are to RSMo 1986.

question herein is whether the nudity was depicted for the purpose of sexual stimulation or gratification of any individual who might view the photographs. The question is one of appellant's intent in taking the photographs and whether or not the state established appellant's intent by sufficient evidence.

Direct proof of a required mental state is seldom available and such intent is usually inferred from circumstantial evidence. *State v. Brown*, 660 S.W.2d 694, 699 (Mo. banc 1983). Proof of purpose may be established by the circumstances of the photography itself. *State v. Helgoth*, 691 S.W.2d 281, 283 (Mo. banc 1985).

The circumstances of the photography in the case at bar are most clearly demonstrated by their content. The photographs exhibit that they were taken for the purpose of sexual stimulation or gratification and they are sufficient evidence of appellant's intent.

The majority characterizes the photographs as bath or pre-bath scenes. While, if believed, the appellant's evidence reflects that at the time the photographs were taken the grandmother was preparing to give the child a bath, the photographs are far from depicting a child being prepared for or given a bath.

Thirty-one of the photographs depict the child and his grandmother either totally nude or nude to the extent featured in a given photograph. Two of the photographs depict only the child in a state of nudity. One of the photographs depicts the child in a diaper with the grandmother standing behind him, leaning over him with her breasts engulfing his head while she smiles for the camera. One photograph depicts the child in a diaper with his grandmother sitting behind him with his head against her chest surrounded by her breasts. One of the photographs depicts the grandmother's bare breasts only and in one picture the grandmother and the child are clothed.

The thirty-one photographs displaying nudity of both the grandmother and the child are of such things as the child pressing on the nipples of the grandmother's breasts, pinching the nipples of her breasts, kissing her breasts, and eating a miniature marshmallow from the nipple of the grandmother's breasts. The photographs appear to be

staged in that "lures", such as marshmallows and a ball, were used to get the child's attention and photograph him in various nude poses with his nude grandmother.

In several of the pictures the grandmother thrusts her breasts toward the child with her hands in a fashion that exhibits her offering her breasts to the child. The pictures in which the child and grandmother are both nude display the child and the grandmother kissing mouth to mouth while he sits on her lap, kidding mouth to mouth while he lays on her lap and kissing mouth to mouth while he lays on her breasts. In many of the pictures the grandmother looks on with an expression of pleasure and enjoyment. In the most telling photograph of all, the grandmother is slouching down on the sofa with her knees bent and her feet positioned on the edge of the seat of the sofa, with her legs spread wide apart. Her genitalia are exposed and presented to the child, who has his hands on a ball that has been placed at her genitals. This picture gives the appearance that the child's right index finger is touching her genitals and the expression on the grandmother's face is one of delight.

In addition, the statement of Patsy Urban was offered by appellant and received in evidence, and further supports the finding of the trial court. In Patsy Urban's written statement to the police following her arrest, she stated that this was the only time appellant had taken photographs of her and her grandson without any clothes on. She also stated, "I will never *again* do anything to harm or abuse that baby." The reasonable inference to be drawn from this statement is that Patsy Urban knew that what she had done was harmful and abusive toward her grandson.

The majority opinion refers to the "stipulated evidence" in the case at bar. It should be pointed out, by way of clarification, that the stipulation was that certain evidence, including a partial transcript from appellant's first trial, could be considered. The state, however, did not, at any time stipulate to the truthfulness or accuracy of the content of any testimony adduced from appellant's witnesses at the first trial.

Concededly, the majority opinion correctly cites the proper standard of review, that when determining whether there is substantial

evidence to support a finding of guilty entered by the trial court, this court accepts as true all the evidence that tends to prove guilt together with all the reasonable inferences favorable to the prosecution that the evidence yields, and disregard all unfavorable inferences. *State v. Morgan*, 592 S.W.2d 796, 805 (Mo. banc 1980). The majority, however, fails to follow that standard in its opinion. In setting forth the evidence, the majority gratuitously references such things as appellant's capability to develop, process and print the exposures at the home, that appellant has photographed the family and its members many times and that the pictures in this instance were taken upstairs, not downstairs where all the professional equipment is kept.

The majority opinion further places some significance on evidence in the record which, if believed, reflects that the activities depicted in the photographs are normal for the family involved. I fail to see the significance of whether or not child abuse is normal for a given family. The state has a compelling interest in protecting all children from abuse regardless of what distorted concept a particular family might have of normalcy.

The majority also correctly states that whether there are two equally valid inferences that can be drawn from the same evidence, one probative of guilt and the other not, the evidence does not establish guilt beyond a reasonable doubt. *State v. Prier*, 634 S.W.2d 197, 200 (Mo. banc 1982). However, the majority, in concluding that there are two such equally valid inferences to be drawn from the evidence in the case at bar, adopts as true appellant's evidence and inferences therefrom unfavorable to the verdict. This is contrary to the standard of review as set forth in *State v. Morgan*.

It is clear from the photographs that they were taken for the purpose of sexually exploiting the child. There certainly can be instances where nudity of a child is depicted in family pictures in a normal and wholesome fashion that is not meant to exploit the child but, the photographs in the case at bar are not in that category.

The circumstances referenced in the majority opinion in no way change or even serve to explain the undisputed conduct displayed in

the photographs. The circumstances referenced by the majority were mostly presented by way of appellant's evidence, they are contrary to the photographs themselves and accordingly, should be rejected.

Considering the facts as revealed in the photographs and all reasonable inferences to be drawn therefrom in the light most favorable to the state, appellant's conviction should be affirmed.

/s/ GARY A. FENNER, Judge

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 48052

STATE OF MISSOURI,
Respondent,

vs.

DAVID L. URBAN,
Appellant.

Filed:
November 14, 1989

CONCURRING OPINION

I concur in Judge Shangler's opinion.

The issue is whether substantial evidence was introduced to prove beyond a reasonable doubt that David Urban's intent when photographing his nude stepgrandchild was to sexually stimulate or sexually gratify anyone who might view the photographs. Section 568.060[1] identifies numerous acts punishable as child abuse if inflicted upon or performed with a child, but Mr. Urban was charged with the only offense identified by § 568.060 requiring the state to prove beyond a reasonable doubt the subjective intent of the person charged. Section 568.060 makes the intent of one photographing a nude child determinative of whether a felony has been committed. Specifically, if Mr. Urban took the photographs in which his nude stepgrandchild appeared for any purpose other than to sexually stimulate or sexually gratify any person who might view them, no crime under § 568.060 has been committed regardless how tasteless, offensive, crude, or repugnant many of the photographs are to the viewer.

The court is compelled to review the intent issue. A jury did not participate in the trial, and the trial court was the trier of fact. No one

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[1] All references to § 568.060 are to § 568.060, RSMo 1986.

testified. The evidence was a stipulated record. The state's burden, however, was unchanged. The failure of the state to prove the requisite criminal intent, a necessary element of the crime, beyond a reasonable doubt violates the due process clause of the Fourteenth Amendment. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979); *In re Winship*, 397 U.S. 358 (1970). Additionally, even though the issue was not raised by counsel, failure to prove the element beyond a reasonable doubt constitutes plain error. Rule 30.20. A person's conviction of a felony where there has been an absence of proof beyond a reasonable doubt of each and every element of the offense is manifest injustice and a miscarriage of justice. *State v. Woods*, 434 S.W.2d 465, 469 (Mo. 1968).

When assessing the sufficiency of the evidence, the inquiry is limited to whether the evidence, viewed in the light most favorable to the prosecution, is sufficient to support conviction. *State v. Story*, 646 S.W.2d 68 (Mo. banc 1983). This court must accept as true all evidence that tends to prove guilt together with all the reasonable inferences favorable to the prosecution that the evidence yields, and the court must disregard all contradictory evidence unfavorable to conviction. *State v. Morgan*, 592 S.W.2d 796, 805 (Mo. banc 1980) (judgment vacated on other ground 449 U.S. 809; opinion on remand 612 S.W.2d 1 (Mo. banc 1981); *State v. Wells*, 754 S.W.2d 590 (Mo. App. 1988). The appellate court's function is not to weigh the evidence but to determine whether there is sufficient evidence from which reasonable persons could have found the defendant guilty as charged. *State v. Barber*, 635 S.W.2d 342 (Mo. banc 1982). Said another way, the appellate court must determine whether substantial evidence supports the finding of guilt. *City of Kansas City v. Oxley*, 579 S.W.2d 113, 115 (Mo. banc 1979). Ordinarily, deference is given to the trial court to ascribe credibility to the witnesses. *In re Adoption of W. B. L.*, 681 S.W.2d 452, 455 (Mo. 1984). When a trial court sits as both trier of fact and law and the evidence presented consists of photographs, transcripts of prior testimony, writings, and transcribed statements, no deference to the trial court for credibility of witnesses is possible since none testified. It is important to remember that a defendant begins trial enjoying a presumption of innocence and that the state bears the

burden of proving him guilty beyond a reasonable doubt. *State v. Barton*, 361 Mo. 7880, 236 S.W.2d 596 (1951). When the trial court began considering whether the stipulated record proved Mr. Urban guilty of the crime charged beyond a reasonable doubt, the judge was compelled by law to presume Mr. Urban innocent. *Id.* This court must then determine whether substantial evidence was presented to overcome the presumption that Mr. Urban was innocent of the crime charged and, therefore, that he did not have the requisite criminal intent when he took the photographs.

Disregarding the evidence offered by Mr. Urban which supports his plea of innocence and which is contested by the state as required by *Morgan*, the court must consider the following: Mr. Urban took the photographs. Mr. Urban's wife, grandmother of A. G., a fifteen-month-old-minor, and A. G. are depicted in the photographs. Both A. G. and Patsy Urban were nude when photographed. The exposed film was taken to a K-Mart store to be processed. The exposed film was processed into photographs, and, unknown to David and Patsy Urban, the photographs were delivered to the county sheriff. The photographs were ultimately delivered to Patsy Urban. David Urban and Patsy were arrested. David Urban did not see the photographs before his arrest. Patsy Urban made a postarrest written statement.

That Mr. Urban photographed his nude wife and stepgrandchild and that the photographs were processed as a result of the exposed film being delivered to a K-Mart store by the defendant is not disputed. There is no dispute that the photographs were delivered to the county sheriff ultimately prompting the filing of charges. Thus, of the relevant evidence identified, only the delivery of the exposed film to K-Mart for processing and the photographs are enlightening of Mr. Urban's intent when he photographed his wife and stepgrandchild.

An offered fact is relevant if it tends to prove or disprove a fact in issue or corroborates evidence which is relevant and which bears on the principal issue. *Lawson v. Schumacher & Blum Chevrolet, Inc.*, 687 S.W.2d 947, 951 (Mo. App. 1985); *State v. Mercer*, 618 S.W.2d 1, 9 (Mo. banc 1981), *cert. denied*, 454 U.S. 933 (1981). Relevancy is that relationship between offered fact and fact in issue to such a degree that

the truth of the offered fact makes probable the existence of the fact in issue. *Id.* The delivery of the exposed film to K-Mart for developing is relevant to the issue of Mr. Urban's intent. This conduct does not support the theory that the photographs were taken to sexually stimulate or gratify a viewer. One who photographs a nude child believing the photographs capable of sexually stimulating or gratifying the sexual desires of anyone who views them and who intends that the photographs sexually stimulate or gratify the sexual desires of anyone who views them will probably not deliver the exposures to a commercial developer. The evidence that Mr. Urban took the exposed film to K-Mart to be developed is not supportive of the allegation that he possessed the necessary criminal intent. This evidence is unfavorable to the conviction and is disregarded. *Morgan*, 592 S.W.2d at 805.

Therefore, for the defendant to be guilty of the crime charged in this case, the photographs themselves must be sufficient to prove beyond a reasonable doubt the photographer's criminal intent. The Supreme Court of Missouri in *State v. Helgoth*, 691 S.W.2d 281 (Mo. Banc 1985), stated that pictures of a nude child, by themselves, can prove the requisite intent contemplated by § 568.060. However, in *Helgoth*, the court considered the defendant's surreptitious effort to take the pictures when determining whether the defendant's criminal intent had been proved. No evidence of an effort to secret the taking of the photographs was proven in this case, and the delivery of the exposed film to a large commercial processor belies an effort to conceal the taking of the photographs.

For some mothers and grandmothers giving a bath to their child or grandchild some time during the child's infancy, when both bathed and bather are nude, is probably not uncommon. When such occurs, the bath may be preceded by play. However, photographing these events is probably not common. Because Mr. Urban's evidence that grandmother and grandchild were engaged in pre-bath play when he innocently interrupted the sequence and, with camera in hand, photographed the occurrence, does not support his conviction, the evidence is disregarded. Photographing nude child and grandmother is not by itself conclusive of the photographer's intent, innocent or criminal. Thus, the contents of photographs are examined for revelation of intent.

The photographs are described in the majority and the several dissenting opinions. I respectfully disagree with my peers who express or imply that Patsy Urban's expressions are tainted by perverse gratification. She smiles in some of the photographs and laughs in others. In some, her face is expressionless. Although I am less quick to evaluate Patsy Urban's facial expressions, I accept Judge Fenner's belief that they express pleasure, enjoyment and delight in the several photographs. To assume, however, that her expressions represent perverse sexual gratification or that they are intended to feign sexual gratification to accomplish the photographer's assumed purpose of sexually stimulating the photographer's assume purpose of sexually stimulating the photographs' viewer requires more than the photographs for proof. Alternatively, Patsy Urban's expressions may be those of a grandmother experiencing delight stimulated by the antics of her fifteen-month-old grandson. The photographs alone are incapable of revealing the motivation for Patsy Urban's facial expressions. One cannot fairly conclude that Patsy Urban's ambiguous facial expressions prove that the photographer possessed the criminal intent required by statute. Where two equally valid inferences can be drawn from the same evidence, one probative of guilty and the other not, the evidence does not establish guilt beyond a reasonable doubt. *State v. Prier*, 634 S.W.2d 197, 200 (Mo. banc 1982). Patsy Urban's facial expressions do not establish the photographer's requisite criminal intent.

I also respectfully disagree with my colleagues who deduce from the photographs that they are staged, implying that the photographer was an accomplice to the staging, thereby proving or corroborating proof of his criminal intent. This conclusion requires conjecture. The photographs are of several scenes that include grandmother and grandchild in different positions, with different objects, both child and adult laughing, smiling or expressionless. A reasonable and fair evaluation of the photographs alone does to compel a reasonably certain conclusion that their content proves they were staged. Another equally valid inference is that the photographs are spontaneous. The subjects look at each other, laugh, kiss, and touch each other and objects. As evidence of whether they were staged or spontaneous, the photographs are ambiguous. Two equally valid inferences can be

drawn from them, one probative and the other not, and, thus, they can not establish Mr. Urban's necessary criminal intent to sexually stimulate or gratify the viewer's sexual desire.

On May 2, 1986, Patsy Urban signed a handwritten statement apparently partially written by a police officer. The statement was prepared soon after she was arrested, advised of her rights, signed a waiver of Fifth Amendment rights form and was interviewed by police officers. The statement was offered as evidence by the defendant, Mr. Urban, and could not have been introduced as evidence by the state because Patsy Urban did not testify. Judge Fenner is persuaded by a comment contained within the statement that Patsy Urban "knew that what she had done was harmful and abusive toward her grandson."[2] It must be remembered that David Urban and not Patsy Urban was the defendant in the case before the court. therefore, to be relevant, Patsy Urban's signed statement must aid in determining David Urban's intent when he took the photographs. What Patsy Urban did or did not do, what her intent was, or what concern she had that events might negatively impact on her grandson when she was told that she had done something criminal has meaning in David Urban's case only if it helps prove beyond a reasonable doubt that his intent when photographing those depicted was to sexually stimulate or gratify anyone who might view the photographs. Patsy Urban's statement does not help to prove Mr. Urban's criminal intent.

I prefer that the photographs not be copied and reported with this case for at least four reasons. First, majority has determined that the

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[2] Judge Fenner refers to the last sentence of the signed statement: "I will never again do anything to harm or abuse that baby." Patsy Urban said that she and her grandchild were playing when her husband took the photographs. Other excerpts from Patsy's statement are: "I would never want to do anything to hurt my grandchild," and "If I had had any idea what we were doing constituted child abuse it would never have occurred. He is the only grandchild we have and he is very special as his mother named him after the son I lost almost three years ago."

intent necessary to prove Mr. Urban guilty of a crime was not proven beyond a reasonable doubt. Thus, Mr. Urban was not proven guilty of the criminal offense charged. In the eyes of the law, he is innocent. Attaching copies of the photographs of the nude grandmother and grandchild to a legal opinion that becomes a public record in perpetuity, thereby embarrassing them and altering their lives, the lives of family members, and even descendants, seems unfair and cruel.

Second, we are a society of some sensitivity for the plight of our children. We have endeavored to protect them from their mistakes, innocently incurred vulnerability and from those among use who would restrict, sanction, limit, or ridicule and embarrass them. We have even instituted laws to effect our purpose. Here, a child is at the heart of this controversy. Although an effort has been made to hide the child's identity by using initials instead of his name, his anonymity will probably not be preserved from persons within the community where the family lives. The charges and resulting occurrences were, no doubt, public knowledge reported in the media, and one can reasonably assume that because of the nature of this case interest will result in additional articles in the printed and electronic news media. To make copies of the photographs more accessible potentially victimizes the child. Accessible photographs may cause embarrassment for the child as he grows to adulthood. Accessible copies of pictures might even be presented to the child periodically by peers or others with cruel intent as he grows older. This court should not encourage such potential abuse by publishing copies of the photographs.

Third, copies of photographs are not the best evidence. Photographs from which copies are made are the best evidence, and because the law strives for accuracy in the presentation of evidence, the introduction of photographs in any trial requires foundation that the offered photographs do not distort events but are accurate depictions of them. Copies of some of the photographs attached to the opinions in this case unfairly distort detail and are, therefore, inaccurate.

Finally, attachment of copies of the photographs to opinions in this case is unnecessary. The several opinions articulate the content of the photographs. The several descriptions of the photographs clearly and

sufficiently verbalize their content. The thoughts expressed and the opinions articulated would not suffer by the photographs' absence.

/s/ Robert G. Ulrich, Judge.

APPENDIX E

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

CASE NO. 06MAY86113595

STATE OF MISSOURI

VS.

DAVID L. URBAN
Acting in Concert With Patsy J. Urban

COUNT I: ABUSE OF CHILD
568.060, 558.011.1(3) & 560.011
RSMo.

COUNT II: PROMOTING CHILD PORNOGRAPHY
IN THE FIRST DEGREE 573.025, 558.011.1(2)
& 573.025.2

SECOND AMENDED INFORMATION

Comes now Suzanne M. Lohman, Assistant Prosecuting Attorney within and for the County of Boone and State of Missouri and upon her official oath charges the defendant, David L. Urban, Acting in Concert With Patsy J. Urban:

COUNT I: In violation of Section 568.060, RSMo, committed the Class C felony of abuse of a child, punishable upon conviction under Sections 558.011.1(3) and 560.011, RSMo, in that on or between the 1st day of April, 1986, and the 30th day of April, 1986, in the County of Boone, State of Missouri, the defendant, acting in concert with Patsy J. Urban, photographed Andrew Gessling, a child less than seventeen years old, engaging in the simulation of a sexual act, to-wit; Andrew Gessling touching Patsy J. Urban's vaginal area, and

COUNT II: In violation of Section 573.025, RSMo, committed the class B felony of promoting child pornography in the first degree, punishable upon conviction under Section 558.011.1(2) and 573.025.2, RSMo, in that on or between the 1st day of April, 1986, and the 30th day of April, 1986, in the County of Boone, State of Missouri, the

defendant, acting in concert with Patsy J. Urban, knowing its content and character, photographed child pornography consisting of Andrew Gessling touching the breasts of Patsy J. Urban, and all against the peace and dignity of the State.

/s/ Suzanne M. Lehman
Assistant Prosecuting Attorney

Suzanne M. Lohman, Assistant Prosecuting Attorney as aforesaid makes oath and states that the facts stated in the above and foregoing are true and correct according to her best information and belief.

/s/ Suzanne M. Lehman
Assistant Prosecuting Attorney

Subscribed and sworn to before me this 24th day of April, 1986.

/s/ Fred Conley
JUDGE of the Circuit Court

WITNESSES:
Susan Stoltz
Doug Schwandt
Ben White
Larry Morgan
Tami Gessling
Marlin Gessling
Pat Woolford
Harold Lokensgard
Rick Germano
Randy McMillen
Irene Isom
Danny Johnson
Lisa Dee Shuver
David L. Surratt
Tom Buell
Frank Burkhead

APPENDIX F

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

CASE NO. 06MAY86113595

STATE OF MISSOURI

VS.

DAVID L. URBAN
Acting in Concert With
PATSY J. URBAN

THIRD AMENDED INFORMATION

Comes now Suzanne Modlin, Assistant Prosecuting Attorney within and for the County of Boone and State of Missouri and upon her official oath charges the defendant, David L. Urban, acting in concert with Patsy J. Urban: In violation of Section 568.060, RSMo, committed the Class C Felony of Abuse of a Child, punishable upon conviction under Sections 558.011.1(3) and 560.011, RSMo, in that on or between the 1st day of April, 1986, and the 30th day of April, 1986, in the County of Boone, State of Missouri, the defendant, acting in concert with Patsy J. Urban, knowingly photographed Andrew Gessling, a child less than seventeen years old, engaging in nudity depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction; and all against the peace and dignity of the State.

/s/ Suzanne Modlin
Assistant Prosecuting Attorney

Suzanne Modlin, Assistant Prosecuting Attorney as aforesaid makes oath and states that the facts stated in the above and foregoing are true and correct according to her best information and belief.

/s/ Suzanne Modlin
Assistant Prosecuting Attorney

Subscribed and sworn to before me this 23rd day of June, 1987.

/s/ Mary Lenfers
BY: Deputy Clerk

/s/ Maxine Owens
Clerk of the Circuit Court

WITNESSES:
Susan Stoltz
Doug Schwandt
Ben White
Tami Gessling
Marlin Gessling
Pat Woolford
Harold Lokensgard
Rich Germano
Randy McMillen
Irene Ison
Danny Johnson
Lisa Dee Shuver
David L. Surratt
Tom Buell
Frank Burkhead

APPENDIX G

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

CASE NO. 06MAY86113595

STATE OF MISSOURI

VS.

DAVID L. URBAN, ACTING IN
CONCERT WITH PATSY J. URBAN

ABUSE OF A CHILD

568.060 558.011.1(3) 560.011

INFORMATION

Comes now Suzanne Modlin, Assistant Prosecuting Attorney within and for the County of Boone and State of Missouri and upon her official oath charges the defendant, David L. Urban, Acting in Concert With Patsy J. Urban: In violation of Section 568.060, RSMo, committed the Class C Felony of Abuse of a Child, punishable upon conviction under Sections 558.011.1(3) and 560.011, RSMo, in that on or about the 1st day of April, 1986, in the County of Boone, State of Missouri, the defendant, Acting in Concert With Patsy J. Urban, knowingly photographed Andrew Gessling, a child less than seventeen years old, engaging in nudity depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction, and all against the peace and dignity of the State.

/s/ Suzanne Modlin
Assistant Prosecuting Attorney

Suzanne Modlin, Assistant Prosecuting Attorney as aforesaid makes oath and states that the facts stated in the above and foregoing are true and correct according to her best information and belief.

/s/ Suzanne Modlin
Assistant Prosecuting Attorney

Subscribed and sworn to before me this 11th day of December, 1987.

/s/ Maxine Owens
Clerk of the Circuit Court

WITNESSES:
Larry Morgan
Harold M. Lokensgard
Irene Isom
Lisa Dee Shuver
Rick Germano
Dan Johnson
Ben White
Pat Woolford
Doug Schwandt
Randy McMillen
Susan Stoltz
Frank Burkhead
Tom Buell
Tami Gessling
Marlin Gessling

APPENDIX H

IN THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI

CASE NO. 06MAY86113595

STATE OF MISSOURI

VS.

DAVID L. URBAN, ACTING IN
CONCERT WITH PATSY J. URBAN

ABUSE OF A CHILD, 568.060,
558.011.1(4) and 560.011, RSMo.

FIRST AMENDED INFORMATION

Comes now Suzanne Modlin, Assistant Prosecuting Attorney within and for the County of Boone and State of Missouri and upon her official oath charges the defendant, David L. Urban, Acting in Concert With Patsy J. Urban: In violation of Section 568.060, RSMo, committed the Class D Felony of Abuse of a Child, punishable upon conviction under Sections 558.011.1(4) and 560.011, RSMo, in that on or between the 1st day of April, 1986 and the 30th day of April, 1986, in the County of Boone, State of Missouri, the defendant, acting in concert with Patsy J. Urban, knowingly photographed Andrew Gessling, a child less than seventeen years old, engaging in nudity depicted for the purpose of sexual stimulation of any individual who may view such depiction, and all against the peace and dignity of the State.

/s/ Suzanne Modlin
Assistant Prosecuting Attorney

Suzanne Modlin, Assistant Prosecuting Attorney as aforesaid makes oath and states that the facts stated in the above and foregoing are true and correct according to her best information and belief.

/s/ Suzanne Modlin
Assistant Prosecuting Attorney

Subscribed and sworn to before me this 14th day of April, 1988.

/s/_____
BY: Deputy Clerk

/s/ Thomas J.Brown
Judge of the Circuit Court

WITNESSES:
Larry Morgan
Harold M. Lokensgard
Irene Isom
Lisa Dee Shuver
Rick Germano
Dan Johnson
Ben White
Pat Woolford
Doug Schwandt
Randy McMillen
Susan Stoltz
Frank Burkhead
Tom Buell
Tami Gessling
Marlin Gessling

APPENDIX I

SENTENCE AND JUDGMENT

CASE NO. 06MAY86 113595

IN THE CIRCUIT COURT OF
BOONE COUNTY, MISSOURI DIVISION

STATE OF MISSOURI

VS.

DAVID L. URBAN

CHARGE(S)
ABUSE OF A CHILD

IT IS ADJUDGED THAT THE DEFENDANT HAS
BEEN FOUND GUILTY BY THE COURT ON 4-14-88
OF A CLASS C FELONY

PROSECUTING ATTORNEY
SUZANNE MODLIN

DEFENSE ATTORNEY
DONALD L. WOLFF/WILLIAM D. ROTTS

PRE-SENTENCE ORDERED

On this 28th day of June, 1988, the Court:

Informs the defendant of the verdict and asks the defendant whether he has anything to say why judgment should not be pronounced, and finds no sufficient cause to the contrary being shown or appearing to the court.

Sentences and commits the defendant to the custody of MO. DIVISION OF CORRECTIONS for a period of THREE YEARS. Granted ___ days of credit. Said sentence to be served concurrent/consecutive with _____.

Sentences and commits the defendant to the custody of _____ for a period of _____. Further ordered that execution of sentence

be suspended and that defendant be placed on probation for a period of _____ under the supervision of the _____ based on the conditions set forth in the Orders of Probation.

Suspends imposition of sentence and places on probation for a period of _____ under the supervision of the _____ based on the conditions set forth in the Orders of Probation.

Finds the defendant in violation of his probation and after considering alternatives to incarceration, orders the previously imposed sentence of _____ executed.

Finds the defendant in violation of his probation and after considering alternatives to incarceration, revokes the Suspended Imposition of Sentence and imposes a sentence of _____.

The Court further orders:

The Clerk to deliver a certified copy of the judgment and commitment to the sheriff.

The Sheriff to authorize one additional deputy to transport defendant to Division of Adult Institutions.

That judgment is entered in favor of the State of Missouri and against the defendant for the sum of $_____ for the Crime Victims Compensation Funds.

Judgment for the State of Missouri and against the defendant for appointed counsel services in the sum of $_____.

Official court reporter to transcribe proceedings and file transcript within 30 days.

Costs taxed against _____.

The following special conditions of probation:_____

_____.

6-28-88
6-29-88

Other: Appeal bond set at $25,000.00; Def. approved for ROR until 4:00 P.M. at which time def. is to report to custody of Sheriff of Boone County unless a bond be posted in such amount before said time.

Property bond in amount of $25,000 posted 6-29-88.

THOMAS J. BROWN,
ASSOCIATE CIRCUIT JUDGE
COLE COUNTY DIVISION

I certify that the above is a true copy of the original Judgment and Sentence of the Court in the above cause, as it appears on record in my office.

Issued this 28th day of June, 1988.

MAXINE OWENS
CLERK

WANDA HARDIN
DEPUTY CLERK

RESPONSE REQUESTED

ORIGINAL

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 90-1134

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF MISSOURI,

Petitioner,

vs.

DAVID URBAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

LAW OFFICES OF
DONALD L. WOLFF

Donald L. Wolff
Attorney for Respondent
8019 Forsyth
St. Louis, Mo.63105
(314) 725-8019
725-8443 (Facsimile)

QUESTIONS PRESENTED

I.

WHETHER THE MISSOURI SUPREME COURT MISAPPLIED GRADY V. CORBIN TO THE FACTS OF THE INSTANT CASE.

II.

WHETHER THIS COURT MISCONSTRUED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN GRADY V. CORBIN.

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STATEMENT OF THE CASE

Respondent does not dispute any facts as set forth by Petitioner in the Statement of the Case. Respondent does add the following pertinent facts.

At the first trial, Respondent was charged with felony child abuse by photographing a child engaged in the simulation of a sexual act, to-wit, touching Patsy Urban's vaginal area (§568.060 RSMo. 1986); and with promoting child pornography by photographing child pornography consisting of touching the breasts of Patsy Urban (§573.025 RSMo. 1986). The jury was effectively charged as follows: To find Respondent guilty of Count I, child abuse, the jury would have to find Respondent guilty of photographing a child engaged in the touching of Patsy Urban's vaginal area. To find Respondent guilty of Count II, promoting child pornography, the jury would have to find Respondent guilty of photographing child pornography which consists of touching the breasts of Patsy Urban. The jury was also effectively instructed that pornography is defined under Missouri law as material or performance depicting sexual conduct or sexual contact, sexual contact being any touching of, among other things, the breasts of a female person for the purpose of arousing or gratifying sexual desire. (§573.025, 573.010 RSMo. 1986).

In support of Counts I and II, the state admitted into evidence at the first trial two rolls of film, the photographs from which totaled forty-eight in number. The photographs

became state's exhibits 10A through 10X and 12A through 12X, respective to each roll. Of the forty-eight photographs, twelve were shots of the outside of Respondent's home or were standard poses of the grandchild fully dressed and seated on a couch. Of the remaining thirty-six photographs, thirty-two showed the child playing on or near his grandmother's lap and because Patsy Urban was nude the photographs depicted her breasts. One photograph showed the child reaching for a ball between Patsy Urban's legs. And three photographs showed the child alone nude in standard pose.

Following the jury trial at which time Respondent was convicted of Count I and acquitted of Count II, Respondent filed a Motion for Judgment of Acquittal, arguing that the evidence was insufficient to sustain the verdict and that the charge did not state a cause of action. He also filed a Motion for New Trial. Although the court denied the Motion for Judgment of Acquittal and granted a new trial, the trial judge stated that the new trial was conditional upon the state filing a proper new information, one that either stated an offense or one which the evidence could support. In fact, what the court did was effectively to grant a conditional dismissal. However, within five days the state filed a new information and again proceeded to trial.

The new information charged Respondent with one count of felony child abuse, alleging that Respondent knowingly photographed a child "engaging in nudity depicted for the purpose of sexual stimulation or gratification of any

individual who may view such depiction." The trial was jury-waived and was based on a stipulated set of facts, a partial transcript from the first trial, and the same set of forty-eight photographs which was again put in evidence over objection. On the basis of the transcript and the forty-eight photographs, the trial judge found Respondent guilty of the charge.

The forty-eight photographs were taken at one time as part of one "photo-shoot" right before Patsy Urban was going to give the child a bath. Specifically, Respondent who was a commercial photographer came home after a photo-shoot and found his wife resting on the couch and his grandson playing. They were both undressed because Patsy Urban was going to give the child a bath before sending him home as requested by his mother. Because Patsy Urban customarily got wet when bathing the child, due to his splashing about, she decided to undress before bathing him this time. Respondent had film remaining in his camera and shot two rolls of film of his wife and grandson because he thought they were "beautiful." Although he had a dark room in his basement, he took the film to K-Mart for developing because it was more convenient.

For the court's reference, the photographs can be found attached to the decision of the Missouri Court of Appeal, No. WD-40852, which is part of the record.

SUMMARY OF THE ARGUMENT

In the recent case of Grady v. Corbin, 495 U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), this Court held that the Double Jeopardy Clause of the Fifth Amendment is violated if, to establish an essential element of an offense charged in a subsequent prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted. The Missouri Supreme Court applied that standard to the instant case, and properly found that the subsequent prosecution was barred by Grady.

The Missouri Supreme Court's holding was based on a finding, supported by the facts, that Count II in the first trial (promoting child pornography), for which Respondent had been acquitted, depended on identical conduct as that charged in the single count at the second trial. Specifically, the court held that the state presented multiple charges, in different proceedings, all based on photographs taken and developed together. Because it was Respondent's conduct which was on trial, and not what the photographs themselves depicted, Grady barred the second trial.

Although the Missouri Supreme Court decision stopped with the above assessment, it is clear that Grady and other U.S. cases barred re-prosecution for other reasons as well. Even if one looked beyond the conduct of the photographer, to the photographs themselves, federal law still requires reversal. Although Petitioner argues that Grady is an anomaly, and should be set aside by this Court because it conflicts with other

Supreme Court precedent, is unwieldy in its implementation, or is a decision that simply comes out of left field - it is obvious that this is not the case. Grady is grounded firmly in Brown v. Ohio, 432 U.S. 161 (1977), which held that "successive prosecutions will be barred in some circumstances where the second prosecution requires the re-litigation of factual issues already resolved by the first." Brown, supra at 166-167 n6. Count II in the first trial resolved the factual issue of whether the "breast" photographs were taken for the purpose of "arousing or gratifying sexual desire." The second trial re-litigated this exact claim in asking whether the same set of photographs (32 of which focused on breasts and one of which focused on the vagina) were taken for purposes of sexually stimulating or gratifying the viewer. Regardless of whether the focus is on the clicking of the camera shutter or on the nature of the photographs, Grady bars the subsequent prosecution. As this is not a case where a state supreme court has decided a federal question in a way that conflicts with applicable Supreme Court precedent, the petition should be denied.

ARGUMENT

INTRODUCTION

The issuance of a Writ of Certiorari is not a right but a matter of judicial discretion. S.Ct. Rule 10.1. Although the Supreme Court may review a judgment of a state supreme court based on a federal question, when the lower court has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court, S.Ct. Rule 10.1(c), this criterion is strictly limited and narrowly invoked. Certiorari will be granted "only when there are special and important questions therefor", Rice v. Sioux City Memorial Park Cemetery Inc., 349 U.S. 70 (1954), and only in cases involving principles the settlement of which is important to the public as distinguished from the parties. Rice, supra; NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951). Evidentiary findings will not be disturbed unless plainly without support, General Talking Pictures, supra, and constitutional issues will not be taken up unless avoidance becomes evasion. Rice, supra. Thus, the primary questions with which this brief is concerned are as follows:

I. Did the Missouri Supreme Court misconstrue Grady or misapply it to the facts of this case?

II. Is this a case of special importance such that certiorari should be granted?

The answer to both questions is in the negative. Grady was correctly read and applied by the state supreme court in this case, and in fact, had the state court chosen to go further, it could have found other U.S. Supreme Court law as

underpinning to its decision. Moreover, Grady, logically forged as it is from precedent, needs no re-visiting by this Court. Petitioner, in an effort to entice this Court with its petition, dramatizes the reach and effect of this matter and in so doing misrepresents its significance. This is an "episodic" case, Rice, supra, one where a state supreme court has merely construed and invoked United States law in its sound judicial discretion. The matter lies between the parties, and its settlement is important there, as distinguished from any special importance to the public. For the reasons more fully explained below, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

I.

WHETHER THE MISSOURI SUPREME COURT MISAPPLIED GRADY TO THE FACTS OF THE INSTANT CASE.

In Corbin v. Grady, 495 U.S. ___, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) the Court went a step beyond its earlier decisions, extending the reach of the Double Jeopardy Clause of the Fifth Amendment beyond "offenses" for which one is twice put in jeopardy to "conduct" for which one is twice put in jeopardy. Grady represents no radical departure from prior law, nor does it truly fabricate a new test. It merely holds that subsequent prosecution is barred if, "to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 110 S.Ct. at 2087. Grady places the focus of the inquiry not on the statutory elements of the successively charged allegations, but on the conduct which was prosecuted. "The critical inquiry is what conduct the state will prove, not the evidence the state will use to prove the conduct." Grady, 110 S.Ct. at 2093. The effect of this expanded inquiry is to preclude the state from "avoid[ing] the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct." Id. The effect is also to implement significant Court policy, e.g, precluding the state the opportunity to rehearse its presentation of proof, and protecting a defendant from the anxiety of multiple trials.

One can see the genesis of Grady by looking at its facts and comparing it to the facts of its predecessor cases. One can also see, by engaging in this review, that the facts of the instant case come squarely within Grady.

In Grady, the defendant crossed the double yellow line, struck two cars, and killed an occupant of one of the cars and injured another. He was cited with misdemeanor driving while intoxicated and with failing to keep to the right. He subsequently pled guilty to the traffic tickets. Sometime thereafter, he was indicted by a grand jury for reckless manslaughter, vehicular manslaughter, negligent homicide and assault. Defendant sought a writ of prohibition barring prosecution on the indictment.

A week after the indictment was issued, the state filed a bill of particulars, wherein it stated that its proof at trial would consist of the following facts: (1) Defendant operated a motor vehicle in an intoxicated condition; (2) Defendant failed to keep to the right; and (3) Defendant exceeded safe speed under the road and weather conditions, all resulting in injury or death to the car occupants.

Thus, the state admitted that it would be proving its case by re-proving the entire conduct for which the defendant had previously been convicted - the DUI and the crossing-over charges. This, said the Supreme Court, is what the Double Jeopardy Clause prohibits. According to the Court, to prove the entirety of the conduct for which the defendant had been

convicted, in order to establish essential elements of the homicide and assault offenses, would result in double jeopardy.

The Court found authority for this reasoning in its earlier case of Illinois v. Vitale, 447 U.S. 410 (1980). In that case, the defendant likewise caused a fatal traffic accident. He was cited at the scene with failure to reduce speed to avoid an accident. He pled guilty to this infraction and was then charged with involuntary manslaughter based on his reckless driving.

Relying on the old Blockburger test, the Court there held that the defendant's subsequent trial was not barred by the Double Jeopardy Clause, the reason being that Blockburger did not bar a second prosecution if each offense required proof of a fact which the other did not. Blockburger v. United States, 284 U.S. 299 (1932). Because in Vitale, involuntary manslaughter required proof of a death but failure to reduce speed did not, and because failure to reduce speed was not a statutory element of involuntary manslaughter, the case survived a double jeopardy challenge. However, the Court went on to say there, that,

> It may be that to sustain its manslaughter case, the state may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede that prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under Brown [v. Ohio 432 U.S. 161 (1977)] and our later decision in Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977).

Vitale, supra at 420.

In the instant case, Respondent, David Urban, had already been acquitted for conduct that was a necessary element of the crime charged at his second trial. As the Grady holding and the Vitale dictum make clear, this constitutes double jeopardy.

At his first trial, Respondent was acquitted of Count II which charged him with promoting child pornography. Specifically, Respondent was found not guilty of photographing child pornography consisting of touching the breasts of Patsy Urban for the purpose of arousing or gratifying sexual desire of any person. In other words, the jury was asked whether Respondent's act of photographing the child touching his grandmother's breasts was for the purpose of titillation. The jury considered this act or conduct, and determined in the negative.

At the second trial, Respondent was charged with photographing a child engaging in nudity depicted for the purpose of sexual stimulation or gratification of any individual who may view such depiction. In other words, the question again was whether Respondent's act of taking the photographs was for the purpose of titillation. Because it was his conduct which was on trial in the first instance, the state was barred from trying Respondent again for this same conduct. Just as in Grady, where the state was seeking to "prove the entirety of the conduct for which Corbin had already been

convicted[1] to establish essential elements of the homicide and assault offense", Grady, 110 S.Ct. at 2094, the state in the instant case, by necessity, had to and did re-prove previously litigated conduct in order to make its case in the second trial.

In its Petition, the state claims that it was not the conduct of taking the photographs for which Respondent was retried, and on this Petitioner is half correct. An act of taking photographs in and of itself violates no law, but must be coupled with photographs which evoke images designed to sexually arouse. However, the fact still remains that the taking of the photographs is an element of both offenses - that charged in Count II of the first trial and that recharged at the second trial. Thus, the state could not conceivably prove its second case without reproving the conduct of the taking of the photographs. This violates Grady, because "the prosecution sought to establish an essential element of the second crime by proving conduct for which the defendant was [acquitted] in the first prosecution." Grady, 110 S.Ct. at 2087.

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[1] It is of no import that the defendant in Grady had been previously convicted, and the Respondent in our case has been previously acquitted. The Double Jeopardy Clause embodies three protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Grady, 110 S.Ct. at 2090.

Looked at another way, Respondent was put on trial the first time for the following conduct: Respondent was a photographer who came home, found his wife and grandson in a state of undress, took two rolls of film consisting of 36 "sexual" photographs, 32 of which showed the child playing with or focused near Patsy Urban's breasts, one of which showed the child reaching for a ball near Patsy Urban's vagina and 3 of which showed the child in an innocuous nude pose alone, and then that Respondent had the film commercially developed. In the second trial, Respondent was put on trial for identical conduct. The only difference there was that the trier of fact was asked whether the photographs depicted nudity in order to titillate, rather than specifically breasts. This is not a distinction which Grady embraces, nor should it: to allow the state to re-try Respondent by dressing up the charge and changing one or two words would be to thwart the concerns this Court has consistently shown in invoking double jeopardy considerations. The due process concerns inherent in the Double Jeopardy Clause cannot be skirted by such a disingenuous slight-of-hand. To quote this Court in Grady: "These cases all recognized that a technical comparison of the elements of the two offenses as required by Blockburger does not protect defendants sufficiently from the burdens of multiple trials." Grady, 110 S.Ct. at 2093.

Thus, it is not the scenes depicted in the photographs which are at issue, but the conduct (and intent) in taking the photographs which is the gravamen of the test. And the

conduct, at issue in trial I and at issue in trial II, was and is identical. Once Respondent had been prosecuted for taking the photographs he could not again be re-tried for this act. He was in fact re-tried for this act, however, and by necessity had to be; the state could not have proven its case at the second trial by leaving out the essential element of "photographing."

Because the Missouri Supreme Court properly found that the instant case falls squarely within Grady, the inquiry should stop here. However, because the state so strenuously denounces Grady, in this or any context, Respondent offers as additional argument set forth below, why the Missouri Supreme Court's decision should be left undisturbed.

As stated by the Court in Grady, Blockburger (barring re-prosecution if the offenses have identical statutory elements or one is a lesser-included offense of the other) is not the only test historically relied on to vindicate the Double Jeopardy Clause's protection against multiple prosecutions. Brown v. Ohio, supra at 166, 167 n6, noted that "successive prosecutions will be barred in some circumstances where the second prosecution requires the re-litigation of factual issues already resolved by the first." A related bar comes into play when an issue of ultimate fact has once been determined by a valid and final judgment; under these circumstances, the state is collaterally estopped from again litigating the same issue between the same parties. Ashe v. Swenson, 397 U.S. 436 (1970).

In the case at hand, the first trial laid to rest the factual question of whether the photographs depicting the child touching Patsy Urban's breasts constituted child pornography, i.e., material the purpose of which is to "sexually arouse". Not satisfied that these photographs simply didn't signify pornography in the minds of the jurors, the state re-submitted the identical photographs at the second trial, and asked the court to find them unlawful because they were intended for purposes of "sexual stimulation." No one is quibbling here that arousal and stimulation are not synonymous. Thus, what the state in fact did was to re-try the question of the nature of the photographs themselves. The only difference was that the second time, the state asked whether it was the nudity that created the arousal or stimulation, rather than the touching of the breasts. Considering that almost all of the photographs admitted both times into evidence were "breast touching" photographs - with only 4 involving mere nudity without juxtaposition to the breasts - the state was estopped from asking the court at the second trial to re-judge the set of photographs. Perhaps had the state at the second trial merely admitted the four "non-breasts" photographs [2] and asked whether

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[2]Actually, the state would have had to exclude the one photograph of the child reaching toward Patsy Urban's vagina. This photograph had been the subject of the litigation of Count I at the first trial, and should not have been the subject of the amended charge at the second trial. Thus, had the state proceeded properly, consistent with both the rule against double jeopardy and the rule of collateral estoppel, it would

(Footnote Continued)

they constituted child abuse, it would not have offended the rule of collateral estoppel embodied in the Fifth Amendment. However, just as in Ashe, where one could rationally conclude only that the jury grounded its verdict on the very issue which the state later sought to re-litigate - one can only conclude here that the court, in arriving at its verdict, based its conclusion of child abuse on the totality of the photographs, including the breast photographs which had previously been characterized as non-pornographic.

> The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of the 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine a record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon a issue other than that which the defendant seeks to foreclose from consideration... When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Ashe, supra at 443-44.

Indeed, the slight-of-hand practiced by the prosecutor in this case is not all that different from that practiced by the

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(Footnote Continued)
have relied only on 3 photographs at the second trial, these being of the child merely standing nude and having his picture taken. The state, having more sense than to hope to convince a judge that these photographs constituted child abuse, did the only thing left available; it admitted all the photographs previously viewed, considered, and litigated by the jury at the first trial.

prosecutor in Brown. In that case, defendant was convicted of joy-riding for operating a vehicle without the owner's consent. In fact, his non-consensual use of the car extended over a nine-day period of time. The state later charged him with car theft for that same taking. The state supreme court upheld the subsequent conviction, reasoning that the theft charge was focused on a different part of the nine-day joy-ride and thus did not constitute double jeopardy. The Supreme Court reversed, holding that "the Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." Brown, supra at 169. That in effect is what the prosecutor attempted to do upon re-trial in this case. Indeed, when Respondent came home and found his wife and grandson readied for a bath, he simply began to click away until his film was spent. The photographs represent a sequence of natural poses captured as the child and Patsy Urban move from the couch to the floor. In other words, the pictures tell a story in time. In taking this singular and discreet set of photographs and dividing them into separate offenses is tantamount to taking a "single crime" and dividing it into "a series of spatial units". Such conduct on the part of the prosecutor can never be encouraged or condoned.

For the above stated reasons, the Missouri Supreme Court was correct in its holding that Respondent's second trial was barred by the Fifth Amendment to the Constitution. Because the decision does not conflict with applicable decisions of this

Court, but in fact falls within an entire line of cases elucidating the Double Jeopardy Clause, Petitioner's Writ of Certiorari should be denied.

II.

WHETHER THIS COURT MISCONSTRUED THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN GRADY V. CORBIN.

Petitioner complains mightily that Grady v. Corbin "signifies a radical departure for this Court in interpreting the Double Jeopardy Clause of the Fifth Amendment," (Petitioner's Brief at page 13). Petitioner also claims that if the Missouri Supreme Court's interpretation of Grady were to be universally adopted, the effect would be a requirement that all charges against a defendant growing out of a single transaction be tried in one proceeding - an approach, says the state, that this Court has steadfastly rejected. The state is wrong on both points.

As argued above, Grady is not a "radical departure" but is grounded firmly in the pointed dictum of Illinois v. Vitale, supra. It is also the next logical step in a long line of cases evolving in response to this Court's efforts to give real meaning to a complex due process issue. Indeed, over the years this Court and others have found that the problems of multiple prosecutions - be they same offense, same transaction, same evidence, or same conduct - come in almost an infinite number of permutations. Moreover, this court has consistently risen to the occasion, developing in response to each new type of divided or multiple prosecution a body of law which strives to both protect the defendant and invoke the literal meaning of the Double Jeopardy Clause itself.

In Justice Brennan's concurring opinion in Ashe v. Swenson, joined in by Justices Douglas and Marshall, and

reiterated seven years later in Harris v. Oklahoma, he discusses the idea of trying all charges once which grow out of a single transaction - an idea which seems anathema to Petitioner. Instead of recoiling at this notion, Justice Brennan embraces it and has no doubt that its authority is found in the Constitution itself.

> In my view the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction. This "same transaction" test not only enforces the ancient prohibition against vexacious multiple prosecutions embodied in the Double Jeopardy Clause but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of the single transaction or occurrence best promotes justice, economy and convenience. Ashe, supra at 453-54.

Justice Brennan was rightfully disconcerted by the "tendency of modern criminal legislation to divide the phases of a criminal transaction into numerous separate crimes" and that the "opportunities for multiple prosecutions for an essential unitary criminal episode are frightening." Ashe, supra at 452. Moreover, he recognized the irony in allowing the Double Jeopardy Clause to be limited to an interpretation which incorporates only the "same evidence" test; under such an interpretation, "criminal defendants would have less protection from multiple trials than civil defendants. This anomaly would be intolerable." Ashe, supra at 457.

The Missouri Supreme Court should be credited with recognizing that what the state did in David Urban's case was to window dress the same offense and pass it off at a second

trial. The Petitioner dislikes this result not because it offends its notion of constitutional law, but because it robbed the state of a conviction. This is not this Court's problem.

Petitioner also complains that Grady is irreconcilable with the recent case of Dowling v. United States, 493 U.S. ___, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). Respondent fails to see how this is so. Dowling did not try the defendant a second time for conduct for which he had previously been convicted; it allowed in evidence a prior bad act - an act which was in no way an element of nor at issue at defendant's second trial; an act which, at the second trial, was subject to a "lower standard of proof," Dowling, 110 S.Ct. at 672; and an act which, at the first trial, had not conclusively been adjudicated. Throwing Dowling into its argument is merely a diversionary tactic: Dowling is not generally at odds with Grady; Dowling is not apposite to the instant case; and any alleged conflict between Dowling and Grady is not reason enough for issuance of a Writ of Certiorari in this matter.

Even assuming that Grady misinterprets the Constitution, Justice Stevens has made a very persuasive argument that the issuance of a Writ of Certiorari is improvident where a state court decision provides greater protection to a citizen than is required by the Constitution. In his dissent in Michigan v. Long, 463 U.S. 1032, 1067-70 (1983), Justice Stevens asserted,

> Even if I agree with the Court that we are free to consider as a fresh proposition whether we may take presumptive jurisdiction over the decisions of sovereign states, I could not agree that an expansive attitude makes good sense. It appears to be common ground that

> any rule we adopt should show "respect for state courts and [a] desire to avoid advisory opinions" ... and I am confident that all members of this Court agree that there is a vital interest in the sound management of scarce federal judicial resources. All of those policies counsel against the exercise of federal jurisdiction. They are fortified by my belief that a policy of judicial restraint - one that allows other decisional bodies to have the last word in legal interpretation until it is truly necessary for this Court to intervene - enables this Court to make its most effective contribution to our federal system of government.
>
> The nature of the case before us hardly compels a departure from tradition. These are not cases in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute. Rather they are cases in which a state court has upheld a citizen's assertion of a right, finding the citizen to be protected under both federal and state law. The complaining party is an officer of the state itself, who asks us to rule that the state court interpreted federal rights too broadly and "overprotected the citizen...
>
> Until recently we had virtually no interest in cases of this type...sometime during the past decade...our priorities shifted. The result is a docket swollen with requests by the states to reverse judgments that their courts have rendered in favor of their citizens. I am confident that a future court will recognize the error of this allocation of resources. When that day comes, I think it likely that the Court will also reconsider the propriety of today's expansion of our jurisdiction.

There is simply no compelling nor even arguable basis for certiorari in this case. The Missouri Supreme Court's decision was soundly based in sound federal law.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MISSOURI,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 90-1134
	)	
DAVID URBAN,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

An original and one copy mailed this 29th day of March, 1991 to the Supreme Court of the United States, One First Street, NE, Washington, D.C. 20543; one copy to the Missouri Supreme Court, Supreme Court Building, P.O. Box 150, Jefferson City, Mo. 65102; and Mr. John Morris, Attorney General's Office, P.O. Box 899, Jefferson City, Mo. 65102.

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